Supreme Court, U.S.
FILED
MAY 11 1999
CLERK

No. 98-942

In The

Supreme Court of the United States

October Term, 1998

WILLIAM FIORE,

v. *Petitioner,*

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX
VOLUME I, PAGES 1 TO 168

JAMES B. LIEBER*
M. JEAN CLICKNER
APRIL L. BOYER
LIEBER & HAMMER, P.C.
5528 Walnut Street
Pittsburgh, PA 15232-2312
(412) 687-2231

HAROLD GONDELMAN
PLOWMAN SPIEGEL & LEWIS, P.C.
310 Grant Street
Pittsburgh, PA 15219-2204
(412) 263-1833

Counsel for Petitioner

ROBERT A. GRACI*
ANDREA F. MCKENNA
Office of Attorney General
16th Floor
Strawberry Square
Harrisburg, PA 17120
(717) 787-6348

Counsel for Respondents

**Counsel of Record*

Petition For Certiorari Filed December 9, 1998
Certiorari Granted March 29, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

171 AP

TABLE OF CONTENTS

Page

VOLUME I

Relevant Docket Entries..... 1

Opinion of the Allegheny County Court of Common Pleas of Pennsylvania Denying Post Verdict Motions, January 19, 1988..... 5

United States v. Lovett, (No. 87-C-8978 (85-CR-284) N.D. Ill. 1988) (attached as Appendix "F" to the December 9, 1998 Petition for Writ of Certiorari) (included in various Appendices throughout record) ..... Pet. App. F-1

Brief of Appellant to the Superior Court of Pennsylvania, September 15, 1988 (selected pages) 64

Memorandum Opinion of the Pennsylvania Superior Court Affirming Judgment of Sentence, May 12, 1989..... 98

Scarpone v. Commonwealth, 141 Pa. Commw. 560, 596 A.2d 892 (1991) (included in various Appendices throughout record) 104

Commonwealth v. Scarpone, 535 Pa. 273, 634 A.2d 1109 (1993) (included in various Appendices throughout record) 115

Motion for Post-Conviction Collateral Relief to Allegheny County Court of Common Pleas of Pennsylvania, March 28, 1994..... 124

Response to Defendant's Motion for Post-Conviction Relief to Allegheny County Court of Common Pleas of Pennsylvania, May 26, 1994..... 135

Commonwealth v. Fiore, 445 Pa. Super., 401, 665 A.2d 1185 (1995) 141

TABLE OF CONTENTS – Continued

Page

Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 to the United States District Court for the Western District of Pennsylvania, June 28, 1996 163

VOLUME II

Brief in Support of Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 to the United States District Court for the Western District of Pennsylvania, June 28, 1996 169

Response to Petition for Writ of Habeas Corpus to the United States District Court for the Western District of Pennsylvania, August 2, 1996 204

Petitioner's Reply to Response to Petition for Writ of Habeas Corpus to the United States District Court for the Western District of Pennsylvania, August 21, 1996 227

United States District Court for the Western District of Pennsylvania Magistrate Judge's Report and Recommendation, February 27, 1997 (attached as Appendix "E" to the December 9, 1998 Petition for Writ of Certiorari) .... Pet. App. E-1

Memorandum Order of the United States District Court for the Western District of Pennsylvania, April 24, 1997 (attached as Appendix "D" to the December 9, 1998 Petition for Writ of Certiorari) ..... Pet. App. D-1

Brief for Appellants to the United States Court of Appeals for the Third Circuit (excluding attachments: Memorandum Order Being Appealed; Magistrate Judge's Report and Recommendation; and Notice of Appeal), July 7, 1997 234

TABLE OF CONTENTS – Continued

Page

Brief of Appellee to the United States Court of Appeals for the Third Circuit, August 5, 1997 282

Judgment of the United States Court of Appeals for the Third Circuit, July 21, 1998 (attached as Appendix "B" to the December 9, 1998 Petition for Writ of Certiorari) ..... Pet. App. B-1

Opinion of the United States Court of Appeals for the Third Circuit, July 21, 1998 (attached as Appendix "A" to the December 9, 1998 Petition for Writ of Certiorari) ..... Pet. App. A-1

Appellee's Petition for Rehearing to the United States Court of Appeals for the Third Circuit, August 3, 1998 322

Order of United States Court of Appeals for the Third Circuit Denying Petition for Rehearing, September 23, 1998 (attached as Appendix "C" to the December 9, 1998 Petition for Writ of Certiorari) ..... Pet. App. C-1

RELEVANT DOCKET ENTRIES

U.S. District Court
Western District of Pennsylvania (Pittsburgh)

6/28/96	1	PETITION for writ of habeas corpus. [Entry date 07/01/96]
6/28/96	2	BRIEF by WILLIAM FIORE in support of Petition for Writ of Habeas Corpus. [Entry date 07/01/96]
6/28/96	3	APPENDIX to [2-1] support brief by WILLIAM FIORE [Entry date 07/01/96]
		• • •
7/2/96	–	CASE REFERRED to Magistrate Judge Francis X. Caiazza.
		• • •
8/6/96	9	ANSWER to Writ of Habeas Corpus by GREGORY WHITE, ATTORNEY GENERAL PA
8/6/96	10	EXHIBITS by GREGORY WHITE, ATTORNEY GENERAL PA in support of [9-1] answer writ by ATTORNEY GENERAL PA, GREGORY WHITE A-N (Copies of State Court Records)
8/21/96	11	RESPONSE by WILLIAM FIORE to [9-1] answer writ by ATTORNEY GENERAL PA, GREGORY WHITE
2/27/97	12	REPORT AND RECOMMENDATION of Magistrate Judge Francis X. Caiazza signed on 2/27/97 Recommending that [1-1] petition be granted; The parties have 10 days from the date of service to file

objections to this Report and Recommendation.

3/14/97 13 OBJECTION by GREGORY WHITE, ATTORNEY GENERAL PA to [12-1] report and recommendations

3/24/97 14 RESPONSE by WILLIAM FIORE to [13-1] objection by ATTORNEY GENERAL PA, GREGORY WHITE

4/24/97 15 ORDER, dated 4/21/97 that the Petition for Writ of Habeas Corpus by the Petitioner is Granted and the Respondents shall release the petitioner from the Portion of his incarceration which pertains to the consecutive sentences imposed for the Jury and the non jury trial convictions adopting [12-1] report and recommendations (signed by Judge Gary L. Lancaster on 4/24/97) [Entry date 04/25/97]

4/24/97 – Case closed. Notices mailed. [Entry date 04/25/97]

5/20/97 17 NOTICE OF APPEAL by GREGORY WHITE from [15-1] order dated 4/14/97

* * *

10/6/98 29 Certified copy of JUDGMENT dated 10/1/98 issued in lieu of a formal mandate received from USCA re: [17-1] appeal by GREGORY WHITE, WILLIAM FIORE that the Judgment of the District Court entered April 25 1997 be and the same is hereby Reversed, Costs taxed against Appellee, in accordance with the

opinion of this Court. [Entry date 10/07/98]

* * *

10/7/98 – Case reopened

12/8/98 30 ORDER entered the Judgment of this court has been reversed by the US Court of Appeals for the Third Circuit by Judgment entered on 7/21/98 the habeas corpus petition filed by William Fiore is Dismissed and the Clerk of court is directed to mark this case Closed. (signed by Judge Gary L. Lancaster on)

12/8/98 – Case closed, Case Closed.

Third Circuit Court of Appeals

5/29/97 CIVIL CASE DOCKETED. Notice filed by Gregory White, Atty Gen Comm of PA.

* * *

7/7/97 BRIEF on behalf of Appellants Gregory White, Atty Gen, Certificate of service date 7/7/97.

7/7/97 APPENDIX on behalf of Appellants Gregory White, Atty Gen, Certificate of service date 7/7/97.

* * *

7/15/97 ADDENDUM to appellants' appendix containing D.C. docket entries.

* * *

8/5/97 BRIEF on behalf of Appellee William Fiore. Certificate of Service date 8/5/97.

8/5/97	SUPPLEMENTAL APPENDIX on behalf of William Fiore. Certificate of service date 8/5/97.
	* * *
8/26/97	SECOND SUPPLEMENTAL RECORD filed.
	* * *
7/21/98	PUBLISHED OPINION (Stapleton, Alito, Authoring Judge, Shadur*, District Judge, *Sitting by designation), filed.
7/21/98	JUDGMENT Reversing. Costs taxed against appellee, filed.
8/4/98	PETITION by Appellee for rehearing in banc. Certificate of service dated 8/3/98, filed.
9/23/98	ORDER (Becker, Chief Judge, Sloviter, Stapleton, Greenberg, Scirica, Authoring Judge, Cowen, Nygaard, Alito, Roth, McKaee, Rendell, Circuit Judges, Shadur*, District Judge *Voted as to panel rehearing only) denying petition for in banc rehearing by Appellee William Fiore, filed.
9/25/98	REPORTER at 149 F.3d: 221
10/1/98	MANDATE ISSUED, filed.
12/14/98	Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by dkt-97-3288, Appellant Atty Gen. Filed in the Supreme Court on 12/9/98 at Supreme Ct. case number: 98-942.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CRIMINAL DIVISION
vs.	:	
WILLIAM FIORE,	:	CC No. 8508740
Defendant.	:	

OPINION

Filed by the HONORABLE
RAYMOND A. NOVAK

Counsel of record:

Keith Welks, Esquire
Office of the
Attorney General
Manor Building, 4th Floor
564 Forbes Avenue
Pittsburgh, PA 15219

Martin W. Sheerer, Esquire
P.O. Box 38246
Pittsburgh, PA 15238

January 19, 1988

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CRIMINAL DIVISION
vs.	:	
WILLIAM FIORE,	:	CC No. 8508740
Defendant.	:	

OPINION

NOVAK, J. January 19, 1988

The defendant, William Fiore, was originally charged with 161 violations of the Solid Waste Management Act and other attendant statutes. Early in pre-trial proceedings, the parties agreed that only those charges which also involved Fiore's co-defendant, David Scarpone, would be tried in one trial and that the remaining charges, much greater in number, which did not involve his co-defendant would be tried in a second trial. This opinion deals with the verdict and sentence in each of those trials.

The defendant was found guilty by a jury on February 18, 1986, of the following charges: Disposing of Hazardous Wastes and Operating a Hazardous Waste Facility Without a Permit (two counts), 35 P.S. §6018.401(a); Discharging Industrial Wastes Without a Permit, 35 P.S. §691.301, 307; Disposing of Residual Wastes and Operating a Residual Waste Facility Contrary to his Permit, 35 P.S. §6018.302(a); Perjury, 18 Pa.C.S. §4902; Obstruction of Administration of the Law, 18 Pa.C.S. 5101; and Criminal Conspiracy, 18 Pa.C.S. §903.

In addition, the defendant was found guilty in a non-jury trial on July 2, 1986, of the following charges: Discharging Industrial Wastes Without a Permit, 35 P.S. §691.301, 307; Disposing of Hazardous Wastes and Operating a Hazardous Waste Disposal Facility Without a Permit, 35 P.S. §6018.401(a); Disposing of Residual Wastes and Operating a Residual Waste Facility Without a Permit (45 counts), 35 P.S. §6018.302(a); Using his Property and the Property of Another as a Solid Waste Disposal Area Without a Permit (two counts), 35 P.S. §6018.501(a); and Disposing of Residual Wastes and Operating a Residual Waste Facility Without a Permit (four counts), 35 P.S. §6018.301.

After the denial of lengthy post-trial motions, the defendant was sentenced on April 10, 1987. The defendant was convicted of sixty counts of violating criminal sanctions of the Solid Waste Management Act and other criminal statutes. We sentenced the defendant on only three of these counts. At Count 1 (Trial 1) (original Count 5), we sentenced the defendant to a period of incarceration of two and one-half to five years and ten years probation. The gravamen of this Count was the deliberate alteration of the groundwater monitoring system which risked the seepage of hazardous wastes into the aquifer. At Count 5 (Trial 1) (original Count 10), lying under oath before the Commonwealth Court, we sentenced the defendant to a consecutive period of incarceration of one to two years and five years probation. At Count 2 (Trial 2) (original Count 2), we sentenced the defendant to a further consecutive period of incarceration of two and one-half to five years and ten years probation. The gravamen

of this Count was the above-gound pumping of hazardous wastes into an unnamed tributary of the Youghiogheny River. The total sentence imposed was a period of incarceration of six to twelve years. In addition, we ordered the defendant to pay the following fines: $100,000 at Count 1 (Trial 1), and $100,000 at Count 2 (Trial 2). A Motion to Modify Sentence was timely filed and denied.

Facts

Trial One (Jury)

The defendant was the owner and operator of a very successful business known as the Municipal and Industrial Disposal Company (MIDC) which is located in Elizabeth Township, Allegheny County. In 1979, he received a permit to dispose of various wastes including hazardous wastes.

In order to properly understand the issues in this case, we believe that a review of the regulation process would be helpful. For each type of waste or "waste stream" which the defendant intended to receive at his site, he was required to submit a "module" to the Department of Environmental Resources (DER) for approval. Known as a "Module 1," this form indicates the type of waste, how it is generated, its chemical and physical characteristics, where it will be placed and how it will be disposed. This information is certified by an engineer employed by the landfill operator. The DER then reviews the proposal to determine whether the particular waste stream is compatible with (1) other waste deposited on that site, and (2) the site liner.

Additionally, the DER considers whether any leachate generated by a particular waste stream is compatible with the end treatment facility. Leachate is another term of art meaning the contaminant generated from either rain, surface or groundwater moving through already deposited waste.

Upon receipt of a module, the DER's technical staff reviews it. In certain instances, the module may be submitted to outside agencies for their review as well. Based upon this analysis, the DER will then either approve or reject the module. If rejected, the landfill operator may not deposit this particular waste at his facility.

Often, the modules do not contain sufficient data to be properly reviewed. They are then returned to the landfill operator for amendment. Modules are often submitted, returned, re-submitted, returned again, re-submitted yet again before they are ready to be reviewed by the DER staff for final disposition. Once accepted for final review by the DER, the review process could take anywhere from a few weeks to several months. With this background, we now turn to the specific facts in this case.

The defendant's disposal facility contained, *inter alia*, a Phase I disposal pit, a temporary disposal pit, and a demolition site. The defendant was licensed to receive certain streams of hazardous wastes and deposit them in the temporary pit and later the Phase I pit. The pit was lined with natural clay which had been found to be sufficient to contain the wastes and keep them from seeping into the aquifer. After the pit was full, it was eventually to be closed and covered in order to return the site to

its natural condition. In order to be sure that the hazardous wastes were not seeping into the environment, various monitoring systems were established.

Running under the Phase I pit is an under-drain which was identified as pipe 810. This under-drain converges with the 711 pipe in a manhole near the pit and emits a single discharge. The purpose of the under-drain, according to Dan Peterson, an operations supervisor in the DER, Pittsburgh Region of the Bureau of Solid Waste Management, was to "convey[ ] mine water beneath the disposal pit carrying it away from the liner. In addition, it was designated in the permit as a monitoring point . . . to check on the integrity of the liner. If the liner would fail, materials seeping out of the pit through the liner would appear in the under-drain (N.T. 2/4/86, pp. 79-83).

In late 1982 and early to mid 1983, Mr. Peterson, during routine inspection visits, detected a "strong organic odor coming from the manhole." He described this odor as "very similar to the type of odor that you get when you're around a disposal pit. Also, it's similar to odors you get at U.S. Steel coke-making facility." (N.T. 2/4/86, p. 96-97). Numerous samples of the discharge from the 711 and 810 pipes were collected by the DER and tested at their laboratory in Harrisburg. The samples tested positive for the presence of organic chemical (i.e., Benzene, Toluene and Xylene) (N.T. 2/4/86, pp. 202-205, 381-382, 528-530; Commonwealth Exhibits 15-22).

The DER officials informed the defendant that no additional requests to dispose of hazardous wastes would be approved "until this matter is resolved." (N.T. 2/4/86, p. 102). Subsequently, several meetings were held

between the defendant and DER officials. As a result of these discussions, the defendant and the Commonwealth entered into a "Consent Order and Agreement" (Commonwealth Exhibit No. 13). The agreement provided that Fiore would apply for a water quality permit (NPDES) which would set certain limits on the chemicals discharged from the site. If the discharge exceeded those limits, the defendant agreed to either establish a treatment plant on the site or collect the discharge and transport it to a treatment plant (N.T. 2/4/86, pp. 103-104).

Subsequently, in November of 1983, James R. Shack, a solid waste specialist for the DER, who took samples from both the 810 pipe and the 711 pipe, noticed that the discharge flow from the 810 pipe had lessened significantly and odors no longer existed (N.T. 2/4/86, p. 207). On July 26, 1984, Mr. Shack observed that there was no discharge flow coming from the 810 pipe. As he was curious about this phenomenon, Mr. Shack climbed down into the manhole and then maneuvered himself up into the 810 pipe. When he did so, he discovered that the 810 pipe had been capped with three or four metal plates (N.T. 2/4/86, pp. 209-211).

Charles Kroll, a welder, testified that he was hired during the summer of 1983 to cap the 810 pipe, install an elbow pipe and another smaller pipe which led to an as yet unused disposal pit (N.T. 2/4/86, pp. 244-247). Mr. Kroll indicated that the defendant observed this pipe installation. In fact, he stated that the defendant instructed him to hide the smaller pipe with a "good size rock." (N.T. 2/4/86, pp. 245-246). Another welder, Elmer Holmes, testified that during the same time period, he was personally contacted and hired by the defendant to

install a two-inch pipe below ground between two larger pipes. Stemming from the two-inch pipe was a stand pipe which stood perpendicular to it and reached the surface of the ground. Inside this stand pipe and attached to the two-inch pipe was a valve which, with the aid of a socket-type wrench, could be turned on and off (N.T. 2/4/86, pp. 305-311).

The capping of the 810 pipe prevented the flow of water from under the Phase I pit into the 810-711 monitoring point. This was the discharge which previously had given off organic odors leading to the finding that hazardous wastes were seeping into the aquifer running under the pit. The newly installed connecting pipe brought water from an as yet unopened pit to a point in front of the cap. Had this alternation not been made, there would have been no flow at all at the monitoring point. A third alteration consisted of a hidden pipe operated by a buried valve covered over with rocks. When the valve was opened, this pipe permitted the drainage which had backed up behind the cap of the 810 pipe to flow through the monitoring point and on into an unnamed tributary of the Youghiogheny River. Tracy Opfar and John Opfar, employees of the defendant, testified that the co-defendant, Scarpone, and others would open this valve at night and on weekends when the DER officials were not likely to appear to check the monitoring point.

Although the defendant was not charged with polluting the waterways, the Commonwealth's evidence established that when the valve was turned on, a discharge flowed from the outfall pipe into the tributary. Samples of this discharge were collected in small stainless steel

buckets (N.T. 2/4/86, pp. 424-433). These samples were transmitted to the DER laboratory in Harrisburg where they were analyzed by DER chemists, David Clemons and Homer Moore. The samples, marked Commonwealth's Exhibits 44-A, 44-B, 45-A, and 45-B, all contained mensurable amounts of hazardous wastes (N.T. 2/4/86, pp. 499-502, 529-530).

Regarding the perjury charge, the Court read to the jury the defendant's sworn testimony from an August 7, 1984, proceeding before the Honorable Francis A. Barry of the Commonwealth Court of Pennsylvania. As part of this testimony, defense counsel asked the defendant the following question: "Mr. Fiore, is there to the best of your knowledge a plate anywhere in the pipe at monitoring well 8-10?" The defendant responsed, "Not that I know of." On cross-examination, the Commonwealth asked the defendant, "Mr. Fiore, did you plug the 8-10 pipe?" The defendant replied, "No." (N.T. Excerpt 2/7/86, pp. 26-30).

Trial Two (Non-Jury)

The credible evidence in this trial established beyond a reasonable doubt that the defendant unlawfully discharged hazardous waste leachate from the Phase I pit into an unnamed tributary of the Youghiogheny River, and unlawfully accepted for disposal certain wastes without having first obtained permission from the DER to do so.

Leachate is defined as "a liquid waste which is generated when surface water or ground water mixes with the solid waste. This water dissolves or absorbs some of the

soluble fraction of the solid waste, removing and carrying it away. The leachate takes on the characteristic[s] of the waste, of the solid waste which it [is] generated from." (N.T. 6/17/86, p. 122).

According to the defendant's permit, the defendant was not permitted to discharge leachate from his facility (N.T. 6/17/86, p. 122). The permit required that all leachate be removed from the facility and transported to an approved treatment facility (N.T. 6/17/86, pp. 132-134).

The testimony of several former employees of the defendant indicated that rather than transport the leachate to the approved treatment facilities, the defendant chose to dispose of the leachate by pumping it out of the Phase I pit into a tributary of the Youghiogheny River. This pumping activity, which usually took place at night and on weekends, occurred regularly over a period of two to three years. The pumping resulted in the water in the tributary becoming dirty, oily and foamy (N.T. 6/17/86, pp. 292-293, 298-299, 302-303, 412-415, 431-432, 462-464, 547-549).

The testimony of several former employees of the defendant indicates definitively that rather than transport the leachate to either of the approved treatment facilities, the defendant chose to dispose of the leachate by pumping it out of the Phase I pit into a tributary of the Youghiogheny River.

Carl Meetze, who worked for the defendant from October, 1980, until December, 1982, stated that he and Theodore Opfar would place a pump at the wateredge of the pit, connect a hose to the pump, and direct the hose over the dike into the tributary (N.T. 6/17/86, pp.

292-293). He participated in pumping the leachate ("the dirty waste water"), usually at night or on weekends, out of both the temporary pit and the Phase I pit "between 15 and 20 times." (N.T. 6/17/86, pp. 298, 302-303). Mr. Meetze described the appearance of the creek during and after the discharge as follows: "It would be dirty. Sometimes looked oily. And sometimes later on it would start foaming, making a dirty looking foam up around the bank." (N.T. 6/17/86, p. 299). Mr. Meetze further testified that the defendant directed the pumping activity on occasion, saw the pump actually running, and saw the leachate being discharged into the tributary (N.T. 6/17/86, pp. 304, 334-335). In fact, the defendant contacted Mr. Meetze after he quit the defendant's employ and requested that Mr. Meetze tell the DER that Theodore Opfar "took care of all the water." (N.T. 6/17/86, pp. 305-308).

Mr. Meetze's testimony concerning the pumping activity was corroborated by the testimony of four other employees of the defendant. Michael Toth and William Baird testified that they saw the pump being operated on several occasions (N.T. 6/17/86, pp. 412-415, 431-432). David Ross stated that he not only witnessed the pumping activity, he actually operated the pump on one occasion (N.T. 6/17/86, pp. 462-464). Tracy Opfar stated that he operated the pump about 20-25 times with the help of his father, Theodore Opfar (N.T. 6/17/86, pp. 547-549).

As further proof of this unlawful pumping activity, the Commonwealth presented the testimony of a professional engineer, Gregory Farrell, who stated that according to his calculations (which took into account the amount of material dumped into the pit, evaporation, water seepage, etc.), the pit should have contained 53,082

cubic yards of waste and water on November 26, 1984. However, according to Mr. Farrell, the actual amount of waste and water in the pit on November 26, 1984, was 47,111 cubic yards – a difference of 5,971 cubic yards or 1,205,903 gallons (N.T. 6/17/86, pp. 574-575).

Regarding the disposal of certain wastes without permission, the testimony showed that the defendant accepted wastes from Ohio Barge Lines, Conoco Coal, and U.S. Steel-Edgar Thompson Works. The wastes from Ohio Barge Lines, which consisted of engine oil and grease, were collected on December 10 and 15, 1981, and dumped into the demolition site (N.T. 6/17/86, pp. 404-406). The testimony of Dan Peterson indicated that only the Phase I pit – not the demolition site – was permitted to accept this type of industrially generated waste (N.T. 6/17/86, pp. 103, 107).

The wastes from Conoco Coal were collected and disposed of at the defendant's facility between December 9, 1981, and January 25, 1982. The defendant did not receive approval from the DER for the disposal of these wastes from Conoco Coal until September, 1982 – approximately eight months after the disposal project had been completed (N.T. 6/17/86, p. 150; Commonwealth Exhibits 17-E through 17-VV).

The wastes from U.S. Steel-Edgar Thompson Works consisted of a load of grease which was hauled from the plant and dumped into the Phase I pit in December, 1981 (N.T. 6/17/86, pp. 460-461). A search of the DER records by Mr. Peterson indicated that the defendant had never received approval from the DER for the disposal of these wastes (N.T. 6/17/86, p. 155).

I.

The defendant alleges that the Investigating Grand Jury lacked jurisdiction and used unlawful procedures.

The authority to convene an investigating Grand Jury and the provisions under which this type of jury serves are found in the investigating Grand Jury Act, 42 Pa.C.S. § 4541, *et seq.* The purpose of this Act is to enhance the ability of the Commonwealth to inquire into criminal activity or public corruption reaching into several counties. *Commonwealth v. Bradfield,* 352 Pa. Super. 490, 508 A.2d 568 (1986).

Section 4544(a) of the act, which provides for the convening of a Multi-County Investigating Grand Jury, states:

> Application for a multicounty investigating grand jury may be made by the Attorney General to the Supreme Court. In such application the Attorney General shall state that, in his judgment, the convening of a multicounty investigating grand jury is necessary because of organized crime or public corruption or both involving more than one county of the Commonwealth and that, in his judgment, the investigation cannot be adequately performed by an investigating grand jury available under section 4543 (relating to convening county investigating grand jury). The application shall specify for which counties the multicounty investigating grand jury is to be convened. Within ten days of receipt of such application, the court shall issue an order granting the same. Failure by an individual justice to grant such application shall be appealable to the entire Supreme Court.

The defendant alleges that the *Application Requesting an Order Directing that a Multi-County Investigating Grand Jury having Statewide Jurisdiction be Summoned* filed with the Supreme Court by the Attorney General, pursuant to this provision, was improper in three respects and that the Supreme Court's Order granting the Application was improper in one respect.

First, the defendant contends that the Application does not specify for what counties the Investigating Grand Jury is to be convened. At a hearing held on December 13, 1985, the Commonwealth introduced, as Exhibit A, a copy of the Application via the testimony of Robert L. Keuch, the Second Deputy Attorney General and Director of the Criminal Law Division of the Attorney General's Office. Contrary to the defendant's allegations, Paragraph 7 of the Application states as follows: "Applicant hereby specifies, pursuant to Section 216(a)(2) of the Act, 42 Pa.C.S. § 4544, that the Multi-County Investigating Grand Jury be convened for all counties within the Commonwealth." Accordingly, the Commonwealth has complied with the requirement that it specify for which counties the multi-county investigating grand jury is to be convened; and, as such, the defendant's allegation is incorrect.

Secondly, the defendant contends that the Application contains no reason or explanation why a County Investigating Grand Jury would not suffice to investigate the crimes in this matter. A review of the Act indicates that there is no requirement that the Attorney General explain his reasons for requesting a Multi-County Investigating Grand Jury. The Act merely requires that the

Attorney General state that "in his judgment" the investigative resources of a statewide grand jury, rather than a county grand jury, are necessary to investigate the presence of organized crime or public corruption. The Attorney General did so in Paragraphs 4 and 5 of the Application. In addition, Paragraph 6 of the application lists several examples of organized crime and public corruption which involve more than one county in this Commonwealth. The Attorney General has, therefore, complied with the requirements of the Act.

Thirdly, the defendant contends that the Application did not specify that any crimes involving improper waste disposal or any violation of the Solid Waste Management Act or the Clean Streams Law would be investigated. Once again, a review of the Act indicates that there is no requirement that the Attorney General specify all the types of crimes to be investigated by the Multi-County Investigating Grand Jury. In fact, to require the Attorney General to so specify would be completely impractical. The Multi-County Investigating Grand Jury is convened for a period of at least eighteen months. The Jury's purpose is not to investigate one or two matters; but rather, it is to investigate several matters, many of which the Commonwealth would be unable to identify at the time the Grand Jury was convened. Accordingly, as the defendant's contention is not supported by the Act, we find it to be meritless.

Fourthly, the defendant contends that the Supreme Court's Order granting the Application failed to specify what counties would supply jurors and in what ratios. On the contrary, the Supreme Court's Order specifically states the following:

(4) That the Court Administrator of Pennsylvania is directed to draw six counties at random from the statewide pool of 67 counties, pursuant to the provisions of Rule 271(a)(1) of the Pennsylvania Rules of Criminal Procedure and that said six counties, plus Dauphin county, shall together supply jurors for the investigating grand jury;

(5) That the Court Administrator of Pennsylvania is directed to obtain the names and addresses of persons residing in the aforesaid counties who are eligible by law to serve as grand jurors, pursuant to the provisions of Rule 271(a)(2) of the Pennsylvania Rules of Criminal Procedure;

(6) That the total of such names of prospective jurors to be collected shall be two hundred (200) of which fifty (50) shall be selected at random and summoned by the Court Administrator of Pennsylvania to Dauphin County, Pennsylvania. The Supervising Judge shall thereafter empanel the investigating grand jury from this panel of fifty (50) prospective jurors . . .

Thus, the defendant's contention concerning the Supreme Court's Order is meritless.

In addition to the above challenges to the jurisdiction of the Multi-County Investigating Grand Jury, the defendant alleges that the Office of the Attorney General lacked investigative or prosecutorial authority in this matter. This contention is incorrect on two grounds. First, as indicated above, we found no impropriety in the manner in which the Investigating Grand Jury was impaneled. Pursuant to the Commonwealth Attorneys Act, 71 P.S. § 732-205(a)(7), the Attorney General has the power

to prosecute in any county criminal court all indictments returned by an investigating grand jury obtained by the Attorney General. Secondly, if the impaneling of the Grand Jury was improper, the Attorney General, pursuant to 71 P.S. § 732-205(a)(6), has the authority to prosecute criminal charges investigated by and referred to him by a Commonwealth agency arising out of enforcement provisions of the statute charging the agency with a duty to enforce its provisions. In this case, the charges against the defendant arose under the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*, and the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, due to the defendant's improper disposal of hazardous waste and his efforts to conceal this disposal by corrupting government officials. Both the Solid Waste Management Act and the Clean Streams Law entrust the enforcement of their provisions to the Department of Environmental Resources (DER), a state agency. The DER investigated this case and referred the criminal charges to the Attorney General and, pursuant to Subsection (a)(6), the Attorney General initiated the prosecution against the defendant. Accordingly, the defendant's allegation that the Attorney General lacked prosecutorial authority in this matter is incorrect.

In summary, as we find that the Multi-County Investigating Grand Jury was properly impaneled, we find that it had jurisdiction to issue presentments in this matter; and therefore, the defendant's challenges to the contrary are without merit

II.

The defendant alleges that his constitutional right to a speedy trial, pursuant to Pa.R.Crim.P. 1100, has been violated.

Pennsylvania Rule of Criminal Procedure 1100 requires that trial commence within 180 days of the date on which the criminal complaint was filed. Also, prior to the expiration of the period of commencement of trial, the Commonwealth may apply to the court for an extension of this time period. Pa.R.Crim.P. 1100(c)(1). Such application shall be granted only upon "a record showing that trial cannot be commenced within the prescribed period despite due diligence by the Commonwealth, and if the delay is due to the court's inability to try the defendant within the prescribed period, upon findings based upon a record showing the causes of the delay and the reasons why the delay cannot be avoided." Pa.R.Crim.P. 1100(c)(3).

The criminal complaint herein was filed on June 6, 1985. This highly technical complaint charged the defendant with over one-hundred violations of the Solid Waste Management Act and other environmental laws. On June 20, 1985, the Commonwealth petitioned the President Judge of Allegheny County to appoint a special district justice, one who was a lawyer, to preside over the preliminary hearings in these matters. District Justice Gary Zyra was appointed as requested by the Commonwealth.

The defense then petitioned the district Justice to set aside several days for the preliminary hearings. The hearings began on August 6, 1985, and lasted several days with an interruption of a few weeks in order to permit the

parties to make legal argument about the admission of certain electronically recorded events. On August 30, 1985, the defendant was held for court on more than one-hundred counts. Throughout this period of time, the defendant's attorney, John J. Doherty, Esquire, assured the prosecutor that his concern was not that the trial commence speedily but on the contrary that he have sufficient time for discovery and pre-trial motions due to the complexity of the case.

Sometime thereafter, this case was assigned to this member of the court. In mid-October, 1985, a pre-trial conference was held. At this conference, the trial of this matter was scheduled for February 3, 1986. As this date was well beyond the final trial date of December 3, 1985, the Commonwealth filed a Motion to Extend the Time for Commencement of Trial. A hearing was held on this motion on November 19, 1985. At the conclusion of this hearing, we granted the Commonwealth's Motion to Extend.

On December 13, 1985, after a lengthy discussion with the defendants and all counsel, we granted defendant-Scarpone's Motion for Severance. This severance resulted in this case becoming two trials rather than one trial. The first trial, which began as scheduled on February 3, 1986, included all charges involving both defendants. This trial concluded on February 18, 1986. The defendant's trial on Bribery and other related charges (CC No. 8509823) began as scheduled on March 11, 1986. That trial concluded on the morning of March 19, 1986. On the afternoon of March 19, 1986, a hearing was held on the Commonwealth's Petition for Extension of Time concerning the second trial on the charges in the within

case. At that time, we took judicial notice of the fact that the next available date for the commencement of a trial estimated to last approximately two weeks would be June 16, 1986 (N.T. 3/19/86, pp. 7-12). The defendant's final trial began on June 17, 1986.

The Commonwealth's Motion was granted for the following reasons:

First, we note that judicial delay due to crowded court dockets is a valid basis for establishing that trial cannot commence within the allotted 180 days. *Commonwealth v. Bogan*, 355 Pa. 32, 512 A.2d 1194 (1986). After reviewing our calendar, we found that a trial of approximately three weeks in length could not be scheduled prior to February 3, 1986 (N.T. 11/19/85, p. 9). This was due to several factors. Most notably, the fact that the *defendant had two other lengthy trials* also scheduled before this member of the court.

Secondly, the present matter and the defendant's other pending matters all involved complex and voluminous pre-trial motions which were scheduled for a hearing on December 13, 1985 – ten days after the final trial date of December 3, 1985. These pre-trial motions concerned, *inter alia*, the Attorney General's authority to prosecute, the powers of the investigating grand jury, and the circumstances of the defendant's prosecution under the Solid Waste Management Act. Due to the complexity of these pre-trial motions, ample time had to be set aside for testimony, argument and rulings on these motions.

Thirdly, the defendant argues that either the Court or the Commonwealth should have investigated the possibility of transferring this case to another judge whose

calendar would have permitted an earlier trial date. This argument has been specifically rejected by our Supreme Court in *Commonwealth v. Crowley*, 502 Pa. 393, 466 A.2d 1009 (1983). In *Crowley*, the Court stated, "[a requirement that] urban areas with severely crowded criminal and civil dockets must continually arrange and rearrange their schedules to accommodate the 180 days rule would be ill-advised." *Id.*, 466 A.2d at 1013. Moreover, the likelihood that another member of the court could schedule three complex trials any sooner than this member of the court was at best miniscule.

Fourthly, regarding the defendant's final trial, we note that, as we found at the hearing on March 19, 1986, the delay of this trial was due not only to our crowded court calendar, but to the fact that both the defense and the prosecution had grossly underestimated the length of the defendant's two prior trials. This miscalculation by counsel reeked havoc with our calendar and required the postponing and rescheduling of several pending matters. This rescheduling of other matters resulted in June 16, 1986 being the earliest date available to begin the defendant's final trial.

In this connection, we also note that the second trial was, to a certain extent, a unique continuation of the first. The nature of co-defendant Scarpone's request for severance was that Mr. Fiore was charged with hundreds of violations but he, Scarpone, was charged with only six or seven. Scarpone argued that it would be unfair to cause him to participate in a trial that would last for several weeks dealing largely with matters in which he was not involved as his financial resources were considerably less than those of defendant Fiore. We agreed to sever the

trials in such a way that Fiore and Scarpone would be tried together on only those matters as to which they stood charged as co-defendants, and that Fiore would then be tried separately on the remaining counts. The record is clear that on December 13, 1985, the defendant Fiore, with counsel in court, agreed to this bifurcation of the environmental charges against him. We note also that the environmental charges were only part of the complex charges brought against this man and that, in fact, Fiore ended up with three trials in order to dispose of these matters. While Fiore ultimately elected to proceed non-jury for his second environmental trial, the fact of the matter is that at the time when it was scheduled, he adamantly insisted on a jury trial requiring the court to set aside sufficient time for jury selection and trial.

Mr. Fiore simply wanted to have it both ways. On the one hand, he wanted a thorough preliminary hearing and requested that several days be set aside for his hearing together with a long interruption for legal argument.

This, to our mind, was a perfectly proper defense request but obviously it required that much of the 180-day period be consumed by pre-trial proceedings. When it came time to waive Rule 1100, he simply wanted to preserve this issue for a possible attack if he were convicted. A defendant simply cannot have it both ways.

Based upon the foregoing, we find that the Commonwealth made a more than adequate showing that it acted with due diligence in attempting to commence the trial in the present case within the prescribed period of time. Moreover, much of the 180-day period was consumed by proper delays initiated by prior defense counsel acting in

the defendant's best interest during the pre-trial proceedings. While this may not be excludable time under the rule, it is certainly a proper consideration when deciding whether or not to grant the Commonwealth's Motion to Extend the Time for Trial. Accordingly, we find no error in our decision to grant the Commonwealth's Motion to Extend.

III.

The defendant alleges that we erred in failing to quash the criminal information due to the unconstitutionality of certain enforcement/penalty provisions of the Solid Waste Management Act (SWMA), 35 P.S. § 6018.101 *et seq.*

The SWMA was enacted by the legislature in 1980 to provide for the planning and regulation of solid waste storage, collection, transportation, processing, treatment and disposal. The stated purpose of the SWMA, as set forth in 35 P.S. § 6018.102, is to:

> (1) establish and maintain a cooperative State and local program of planning and technical and financial assistance for comprehensive solid waste management;
>
> (2) encourage the development of resource recovery as a means of managing solid waste, conserving resources and supplying energy;
>
> (3) require permits for the operation of municipal and residual waste processing and disposal systems, licenses for the transportation of hazardous waste and

permits for hazardous waste storage, treatment, and disposal;

(4) protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes;

(5) provide a flexible and effective means to implement and enforce the provisions of this act;

(6) establish the Pennsylvania Hazardous Waste Facilities Plan, which plan shall address the present and future needs for the treatment and disposal of hazardous waste in this Commonwealth;

(7) develop an inventory of the nature and quantity of hazardous waste generated within this Commonwealth or disposed of within this Commonwealth, wherever generated;

(8) project the nature and quantity of hazardous waste that will be generated within this Commonwealth in the next 20 years or will be disposed of within this Commonwealth, wherever generated;

(9) provide a mechanism to establish hazardous waste facility sites;

(10) implement Article I, section 27 of the Pennsylvania Constitution; and

(11) utilize, wherever feasible, the capabilities of private enterprise in accomplishing the desired objectives of an effective, comprehensive solid waste management program.

The defendant makes several challenges to the Criminal Penalties, § 6018.606(a) and (b), sections of the SWMA. These sections state:

(a) Any person, other than a municipal official exercising his official duties, or any municipality who violates any provision of this act, the rules and regulations of the department, or any order of the department, or any term or condition of any permit upon conviction thereof in a summary proceeding, shall be sentenced to pay a fine of not less than $100 and not more than $1,000 and costs and, in default of the payment of such fine and costs, to undergo imprisonment for not more than 30 days.

(b) Any person, other than a municipal official exercising his official duties, who violates any provision of this act, any rule or regulation of the department, any order of the department, or any term or condition of any permit, shall be guilty of a misdemeanor of the third degree and, upon conviction, shall be sentenced to pay a fine of not less than $1,000 but nor [sic] more than $25,000 per day for each violation or to imprisonment for a period of not more than one year, or both.

All of the defendant's challenges were specifically ruled upon by our Supreme Court in *Commonwealth v. Parker White Metal Co.*, 512 Pa. 74, 515 A.2d 1358 (1986), wherein the Court upheld the constitutionality of these provisions of the SWMA. First, the defendant challenges the constitutionality on the ground that paragraphs (a) and (b) proscribe identical conduct yet provide for vastly

different penalties. In rejecting this equal protection argument, the Court stated, "there is no equal protection infirmity in an act merely because it allows the prosecutor or enforcement agency to choose between two different penalty provisions for similar unlawful conduct and that the mere *possibility* that a prosecutor *might* selectively enforce the provisions of an act for improper motives does not invalidate that act." (Emphasis in original) *Id.*, 515 A.2d at 1364).

Secondly, the defendant argues that paragraphs (a) and (b) create arbitrary classifications. The Supreme Court, in *Parker White*, held that the SWMA does not create any classifications. *Id.*, 515 A.2d at 1363. Further, if there are any classifications created by these sections, they have "a rational basis and [they bear] a fair and substantial relation to legitimate objects of the legislation," and therefore, there is no violation of equal protection principles. *Id.*, 515 A.2d at 1366.

Thirdly, the defendant argues that paragraphs (a) and (b) provide no guidance for prosecutors or agencies charged with enforcing them. In rejecting this due process argument and holding that the decision whether to prosecute an alleged offender under paragraph (a) or (b) is a matter within the sound discretion of the prosecutor or agency, the Supreme Court stated:

> In light of the foregoing principles, it should be obvious that sections 606(a) and 606(b) of the Act do not offend due process in allowing the prosecutor or agency to choose between ranges of penalties nor in failing to provide precise standards narrowing the prosecutorial discretion to so choose. Appellees were

> *fully* informed by the terms of the Act of exactly what conduct was proscribed as well as the full range of civil, criminal and equitable remedies and penalties to which they might be subjected for violating a substantive provision of the Act. It is of no constitutional significance that appellees were not advised in advance as to which of the two applicable penalty ranges the prosecutor or agency would choose to prosecute them under for their violations (alleged) of the Act, for a defendant has no right to a particular sentence within the range authorized by statute. (Emphasis in original) *Id.*, 515 A.2d at 1368.

Fourthly, the defendant argues that paragraphs (a) and (b) constitute an unlawful delegation of authority to the prosecutors or agencies charged with enforcing them. In rejecting this argument, the Supreme Court stated:

> From what we have stated in the preceding sections, it is apparent that the legislature has delegated *none* of its authority to the prosecutors and agencies. Quite to the contrary, the Act specifically and unambiguously establishes "what constitutes a crime," and specifically and unambiguously establishes the full range of penalties possible for commission of those crimes. That the legislature has allowed the prosecutor some discretion and much flexibility in choosing from among the full panoply of civil, criminal and equitable remedies does not delegate any of the legislative power or function to the executive branch. (Emphasis in original) *Id.*, 515 A.2d at 1369.

In summary, as our Supreme Court has specifically ruled on all of the defendant's challenges to §6018.606 (a)

and (b), we find no error in our denial of the defendant's Motion to Quash the Information.

IV.

The defendant alleges that we erred in failing to quash the criminal information because: (a) certain provisions of the Solid Waste Management Act (SWMA), 35 P.S. §6018.101 *et seq.*, unconstitutionally delegates legislative authority, and (b) certain actions by the Department of Environmental Resources (DER) were beyond the scope of its delegated authority.

a.

The delegation of legislative authority has long been recognized in this Commonwealth. In *Bell v. Driscoll*, 343 Pa. 109, 21 A.2d 912, 915 (1941), the Supreme Court stated that "[w]here the legislature establishes primary standards and then delegates to an administrative body the power to determine some fact or state of things upon which it makes, or intends to make, its own action depend, it is the legislature which has legislated and not the administrative body." Thus, if the legislature's basic policies are expressed in the form of general statutory standards which are reasonable and provide adequate guidance, an administrative agency may be delegated the authority to implement the legislative intent and to exercise discretion in carrying out its responsibilities without violating any constitutional principles. See *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975); *Commonwealth v. Cherney*, 454 Pa. 285, 312 A.2d 38 (1973).

The defendant argues that the SWMA impermissibly grants to the Department of Environmental Resources (DER) and the Environmental Quality Board (EQB) certain legislative powers – i.e., the authority to determine what type of conduct is subject to criminal sanctions under §§301, 302(a) and 401(a) of the SWMA. A review of these sections of the SWMA, in conjunction with §§104 and 105 (which set forth the powers and duties of the DER and the EQB), indicates rather clearly that the defendant's allegation is without merit.

The SWMA, in §104, confers upon the DER the authority to administer its provisions, including the regulation of the storage, collection, transportation, processing, treatment and disposal of solid waste and the issuance of permits, licenses and orders specifying the terms and conditions thereof. In §105, the SWMA charges the EQB with the duty "to adopt rules and regulations of the department to accomplish the purposes and to carry out the provisions of this act, including but not limited to the establishment of rules and regulations relating to the protection of safety, health, welfare and property of the public and the air, water and other natural resources of the Commonwealth."

Sections 301, 302(a) and 401(a) provide as follows, respectively:

Section 301. Management of residual waste

> No person or municipality shall store, transport, process, or dispose of residual waste within this Commonwealth unless such storage, or transportation is consistent with or such processing or disposal is authorized by the rules

and regulations of the department and no person or municipality shall own or operate a residual waste processing or disposal facility unless such person or municipality has first obtained a permit for such facility from the department.

Section 302(a). Disposal, processing and storage of residual waste

(a) It shall be unlawful for any person or municipality to dispose, process, store or permit the disposal, processing or storage of any residual waste in a manner which is contrary to the rules and regulations of the department or to any permit or to the terms or conditions of any permit or any order issued by the department.

Section 401(a). Management of hazardous waste

(a) No person or municipality shall store, transport, treat, or dispose of hazardous waste within this Commonwealth unless such storage, transportation, treatment, or disposal is authorized by the rules and regulations of the department; no person or municipality shall own or operate a hazardous waste storage, treatment or disposal facility unless such person or municipality has first obtained a permit for the storage, treatment and disposal of hazardous waste from the department; and, no person or municipality shall transport hazardous waste within the Commonwealth unless such person or municipality has first obtained a license for the transportation of hazardous waste from the department.

Viewing all of these sections together, it is clear that the defendant's contention is meritless for the following reasons. Initially, his argument is inapplicable to the facts

of the present case because the defendant was not charged with violating any rule or regulation promulgated pursuant to the SWMA. Rather, the defendant was charged with violating several direct provisions of the SWMA: §301 – disposing of residual wastes and operating a residual waste disposal facility without a permit, §302(a) – disposing of residual wastes and operating a residual waste facility contrary to the conditions contained in the permit issued for the facility by the DER, §401(a) – disposing of hazardous wastes and operating a hazardous waste disposal facility without a permit, and §501(a) – using his property and the property of others as a solid waste disposal area without a permit. We find no error in our denial of the defendant's request to quash the information on this ground.

Secondly, contrary to the defendant's contention, the SWMA contains a clear and definite statement of the legislature's policies together with reasonable and adequate standards to guide both the DER and the EQB in their implementation of these policies. As stated previously, §102 sets forth the eleven purposes of the SWMA. These purposes contain guidelines which limit the discretion of the DER and the EQB, and include the requirement of permits "for the operation of municipal and residual waste processing and disposal systems" and the protection of "the public health, safety and welfare from the short and long-term dangers of transportation, processing, treatment, storage, and disposal of all wastes."

Thirdly, the defendant suggests that the regulatory scheme of the SWMA violates the constitution in that the legislature failed to state exactly what regulations, if violated, would constitute a crime. On the contrary, the

SWMA, in §606, provides specific criminal penalties, including fines and imprisonment, for violations of any and all of the statutory provisions and/or departmental rules and regulations.

Based on the foregoing, which includes our careful reading of the SWMA, we find that our denial of the defendant's Motion to Quash due to the legislature's unconstitutional delegation of authority in the SWMA was correct.

b.

The defendant contends that the DER and the EQB acted beyond the scope of their authority in impermissibly including as a permit condition the requirement that he submit a Module One for departmental approval with respect to each and every waste – residual or hazardous – to be disposed of in the Phase I pit at his disposal facility.

In this regard, the defendant argues that the DER/EQB regulation requiring operators of hazardous waste disposal facilities to obtain DER approval before disposing of a specific waste from a particular generator for the first time conflicts with §501(c) of the SWMA, which the defendant maintains requires only that an operator file one notification with the DER identifying, generically, each hazardous substance received at the facility. The defendant's contention is inaccurate. Section 104(7) of the SWMA specifically authorizes the DER to issue permits and specify therein the conditions thereof in order to implement the goals and provisions of the SWMA. Also, §502(f), which provides for permit and license application

requirements, provides, in pertinent part: "The department may require such other information, and impose such other terms and conditions, as it deems necessary or proper to achieve the goals and purposes of this act." Accordingly, the DER acted within the scope of its delegated authority in including conditions in the defendant's permit requiring prior approval for each industrial waste to be deposited in the Phase I pit of the disposal facility.

Based on the foregoing, which, once again, includes our careful reading of the SWMA, we find that our denial of the defendant's Motion to Quash due to certain actions by the DER and EQB which were beyond the scope of their authority was correct.

V.

The defendant alleges that we erred in failing to dismiss all charges due to a violation of the Statute of Limitations.

Section 617 of the Solid Waste Management Act (SWMA), 35 P.S. §6018 *et seq.*, entitled Limitation on Action, provides:

> The provisions of any other statute to the contrary notwithstanding, actions for civil and criminal penalties under this act may be commenced at any time within a period of 20 years from the date the offense is discovered.

The charges in the within matter were filed on June 6, 1985. All charges concerned conduct by the defendant which took place in the preceding six years. Thus, under the twenty-year period of limitations, all charges were properly commenced.

The defendant would have us ignore §617 and apply the period of limitations as set forth in 42 Pa.C.S. §5551 *et seq.*, referring to criminal prosecutions. Having reviewed both of these statutes, we find unquestionably that the former applies in the within matter. Further, we note that the defendant's position is supported by neither sound reasoning nor legal authority. Accordingly, we find that as all charges were filed within the applicable statute of limitations, the defendant is not entitled to a dismissal of the charges.

VI.

The defendant alleges that the evidence proffered by the Commonwealth during his first environmental trial was insufficient to sustain his convictions in the within matter.

The test for sufficiency of the evidence is whether the evidence admitted at trial is sufficient to prove every element of the crime charged beyond a reasonable doubt. *Commonwealth v. Davis*, 491 Pa. 363, 421 A.2d 179 (1980). In this regard, the evidence must be viewed in the light most favorable to the party in whose favor the verdict was returned, and all reasonable inferences must be accepted as true. *Commonwealth v. Burton*, 450 Pa. 532, 301 A.2d 599 (1973). Further, the Commonwealth does not have to establish guilt to a mathematical certainty and it is sufficient if the circumstances are consistent with criminal activity even though they might likewise be consistent with innocent behavior. *Commonwealth v. Herman*, 227 Pa. Super. 326, 323 A.2d 228 (1974).

(a) Notice of the Offense in Count One

The defendant alleges that Count One of the criminal information does not give notice of the offense charged. The due process requirement of notice can be succinctly stated as follows: A defendant must be given clear notice of the charges against him so that he can properly prepare a defense. *Commonwealth v. Fulton*, 318 Pa. Super. 470, 465 A.2d 650, (1983).

Count One of the criminal information states:

> The defendant William Fiore did operate a hazardous waste disposal facility without a permit from the DER for such disposal facility, to wit, the defendant operated his hazardous waste disposal facility in Elizabeth Township, Allegheny County following alterations, carried out by accomplices and others acting under his direction, of its approved monitoring pipes in 1983 without a permit from the DER for such a facility, in violation of 35 P.S. §6018.401(a), a felony of the second degree pursuant to 35 P.S. §6018.606(f).
>
> 18 Pa.C.S. §306

The defendant alleges that the alteration of the pipes had no effect on the validity of his permit, and therefore, as he had a valid permit, Count One fails to provide him with adequate notice of the offense. The defendant's allegation and its surrounding reasoning are, at best, circular and confusing. Count One sets forth in clear and concise language the unlawful conduct of the defendant which resulted in his operation of the disposal facility without a permit. Thus, the notice requirement is satisfied.

Further, the defendant appears to be alleging that the Commonwealth must set forth its entire proof of the crime in each count of the information. The defendant is incorrect. To require the Commonwealth to do so would be both impractical and burdensome. Our reading of Count One indicates without a doubt that the defendant was given more than adequate notice of the charged offense. Accordingly, we reject this allegation of the defendant as meritless.

(b) Possession of Necessary Permits

The defendant alleges that the evidence was insufficient to prove that he operated a hazardous waste disposal facility without a permit from the Pennsylvania Department of Environmental Resources (DER) for such disposal facility.

In essence, the defendant contends that he possessed a permit issued by the DER for his waste disposal facility during the time that he altered the groundwater monitoring system for the Phase I pit and, as such, the existence of that permit constitutes an absolute defense to the charges. We find the defendant's contention unpersuasive.

The permit issued by the DER authorized specified disposal activities which are to be conducted in accordance with the facility design plans and specifications submitted with the permit application. According to §610(2) of the SWMA, *it* is unlawful for any person to alter any solid waste disposal facility without a permit from the DER.

The manner in which permit applications are prepared, submitted, evaluated and approved or denied by the DER was explained via the testimony of Dan Peterson, an operations supervisor in the Pittsburgh Region of the Bureau of Solid Waste Management. Mr. Peterson stated that after the applicant acquires a site for the facility, he must then hire a consultant to complete various modules which provide information and design plans for the facility. These modules would then be reviewed by the DER. After meetings between the parties and modifications (if necessary) to the modules, the permit would either be granted or denied (N.T. 2/4/86, pp. 52-54). Mr. Peterson also stated that after the disposal facility was constructed, the applicant's engineer must submit a certification indicating that the facility has been constructed in conformance with the approved modules (N.T. 2/4/86, p. 60).

With regard to the defendant's facility in Elizabeth Township, Allegheny County, Mr. Peterson testified that the defendant was issued a permit in 1979 for the Municipal and Industrial Disposal Company (MIDC). This permit was amended by the defendant submitting a Module I which identified the chemical components of each new waste to be disposed of and the DER, after conducting compatibility studies between the new waste and the liner of the Phase I pit, approving the disposal of the new waste (N.T. 2/4/86, pp. 56-63).

The defendant's facility contains an under-drain identified by Mr. Peterson as pipe 810. This under-drain, which runs beneath the disposal pit, converges with the 711 pipe in a manhole and emits a single discharge. The purpose of the under-drain, according to Mr. Peterson,

was to "convey[ ] mine water beneath the disposal pit carrying it away from the liner. In addition, it was mentioned in the permit as a monitoring point . . . to check on the integrity of the liner. If the liner would fail, it would be natural for any materials coming out of the pit through the liner to end up in the under-drain." (N.T. 2/4/86, pp. 79-83).

In late 1982 and early-to-mid 1983, Mr. Peterson, during his inspection visits to the defendant's facility, detected a "strong organic odor coming from the manhole." Organic odors often indicate the presence of hazardous waste in the aquifer flowing beneath the pit. Samples of the discharge into the manhole from the 810 pipe and the 711 pipe were taken by James R. Shack, a solid waste specialist for the DER. The defendant's explanation of the odor was that it was the result of "the air settling in the low point, odors from the pit . . . had settled there." (N.T. 2/4/86, pp. 96-102). Due to these odors, Mr. Peterson advised the defendant that no more Module I requests would be approved until the matter was resolved (N.T. 2/4/86, p. 102).

In November, 1983, Mr. Shack noticed that the discharge flow from the 810 pipe had lessened significantly and the odors no longer existed. The defendant's explanation for this was that the mine had "cleaned itself out." (N.T. 2/4/86, p. 207). Mr. Shack's testimony was corroborated by the testimony of Sam Harper, a DER water quality specialist, who stated that during August, September and October, 1983, he detected a decrease in the flow from the 810 pipe (N.T. 2/4/86, pp. 322, 334).

During a routine inspection on July 26, 1984, Mr. Shack observed that there was no discharge flow coming from the 810 pipe. In an effort to investigate the reason for the lack of discharge, Mr. Shack climbed down into the manhole and then maneuvered himself up into the 810 pipe. When he did so, he discovered that the 810 pipe had been capped with three or four metal plates (N.T. 2/4/86, pp. 209-211). A photograph of this cap, taken by Mr. Shack on the same day, was admitted into evidence as Commonwealth Exhibit 23 (N.T. 2/4/86, p. 212).

An investigation into the circumstances surrounding the capping of the 810 pipe revealed that a welder, Charles Kroll, was hired during the summer of 1983 to cap the 810 pipe, install an elbow pipe and another smaller pipe which led to an as yet unused disposal pit (N.T. 2/4/86, pp. 244-247). The effect of these alterations was to seal off any actual discharge from the 810 pipe (which ran under the Phase I disposal pit) and replace it with a clean discharge from the unused pit. This prevented the detection of seepage of hazardous waste into the aquifer. Both Mr. Peterson and Mr. Shack testified that no one ever advised either of them that there had been any alterations to the 810 pipe (N.T. 2/4/86, pp. 156, 208).

The foregoing testimony clearly indicates that the defendant failed to operate his disposal facility in accordance with the facility design plans and specifications as spelled out in the original permit application. The original permit application provided for the use of the 810 pipe for purposes of monitoring the water beneath the disposal pit. It was necessary to monitor the mine water to ensure that the disposed of wastes were not contaminating the water and the soil. The alterations to the 810

pipe so that it was monitoring the clean water in an usued [sic] disposal pit rather than monitoring the mine water under the Phase I pit constituted a willful and deliberate act by the defendant designed to operate his facility outside the parameters of the permit. In fact, the defendant's alterations of the 810 pipe represented such a significant departure from the terms of the existing permit that the operation of the hazardous waste facility was "un-permitted" after the alterations were undertaken by the defendant. Contrary to the defendant's contention, he did not possess all necessary permits; specifically, he did not possess a permit which allowed the disposal of hazardous waste after the monitoring system was altered. Therefore, we reject the defendant's contention as incorrect.

(c) Actual Discharge Without a Permit

The defendant alleges that the evidence was insufficient to prove that any discharges without a permit actually occurred.

Contrary to the defendant's contention, the testimony of the Commonwealth's witnesses indicated that the defendant did, in fact, actually discharge wastes. Elmer Holmes, a welder, testified that during the warm weather in 1983, he went to the defendant's disposal facility at the request of the defendants and installed a two-inch pipe below ground between two larger pipes. Stemming from the two-inch pipe was a stand pipe which stood perpendicular to it and reached the surface of the ground. Inside this stand pipe and attached to the two-inch pipe was a valve which, with the aid of a socket-type

wrench, could be turned on and off. On top of the stand pipe was a cap (N.T. 2/4/86, pp. 305-311).

Tracy Opfar, an employee of the defendant, testified that on at least five or six occasions he accompanied his father, Theodore Opfar (the site manager), to the location of the stand pipe. Mr. Opfar testified that on these occasions, his father would move rocks and dirt from the stand pipe, remove the cap, insert a tool into the stand pipe, turn the tool, and then replace the cap and the rocks and dirt (N.T. 2/6/86 Excerpt, pp. 12, 20-22). After this procedure took place, Mr. Opfar stated that, "I could just hear a little bit of water running . . . A little bit more water running." (N.T. 2/6/86 Excerpt, p. 13). Also, Mr. Opfar stated that this procedure would take place early on a Saturday morning and then his father would return on a Sunday night and repeat the same procedure (N.T. 2/6/86 Excerpt, pp. 12-13, 23).

This testimony of Tracy Opfar was corroborated by the testimony of his brother, John Opfar. John Opfar stated that on one occasion during the summer of 1983, defendant Scarpone gave him a long bar onto which a socket had been welded and told him to go down to the manhole and turn a valve off. After looking around the manhole for a few minutes, John Opfar testified that he found a capped pipe under a rock, removed the cap, placed the tool inside the pipe and turned the valve (N.T. 2/6-7/86 Excerpt, pp. 16-18, 26).

In addition to this testimony, David Duncan, an investigator for the Toxic Waste Prosecutions Unit of the DER Bureau of Solid Waste Management, testified concerning the execution of a search warrant on September

25, 1984. During the search of the defendant's disposal site, Mr. Duncan, who was accompanied by several other persons, discovered the capped stand pipe. When they dug up the ground around the stand pipe with a backhoe, they unearthed the valve and the two-inch pipe. In order to determine what type of discharge, if any, would be emitted when the valve was turned on, the searchers dug out an area around the outfall pipe, turned on the valve and collected the discharge flowing out of the outfall pipe in small stainless steel buckets (N.T. 2/4/86, pp. 424-433). The discharge samples were then transmitted to the DER laboratory in Harrisburg where they were analyzed by DER chemists, David Clemens and Homer Moore. The samples, marked Commonwealth's Exhibits 44-A, 44-B, 45-A and 45-B, all of which were taken after the valve was opened, *contained hazardous wastes* (N.T. 2/4/86, pp. 499-502, 529-530).

On the basis of this testimony, the jury could very easily have concluded that the defendant actually did discharge wastes. The testimony was clear that the defendant surreptitiously diverted the discharge flow by the use of the two-inch pipe and the valve. Also, the testimony was clear that the valve was turned on on a number of occasions and that the "opening" of the valve resulted in the discharge of the backed-up wastes through the outfall pipe into the stream. Thus, we find that there was sufficient evidence to prove that the defendant actually discharged wastes, and therefore, we find no error in the jury's verdict.

(d) Sufficiency of the Evidence of Perjury

The defendant alleges that the evidence was insufficient to establish that his sworn statement denying the existence of the cap of the 810 monitoring pipe in his testimony before the Commonwealth Court was not given with the sincere belief in its truthfulness.

Perjury is defined in 18 Pa.C.S. §4902 as follows:

> A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.

In this case, the charge of Perjury arose from testimony given by the defendant in a proceeding before the Commonwealth Court on August 7, 1984. During both direct and cross examination, the defendant denied that there was a cap or plate of any sort anywhere in the 810 pipe (N.T. 2/7/86 Excerpt, pp. 27-30).

The above-stated testimony of Charles Kroll, James Shack, Tracy Opfar, John Opfar, and Charles Moore clearly indicates that there was, in fact, a metal plate welded inside the 810 monitoring pipe which capped it and prevented the flow of any further discharge from this pipe. In addition, these witnesses indicated that the defendant was, at the very least, one of the supervisors directing the "capping" procedure which took place over a weekend in the summer of 1983. The defendant's denial that there was a cap on the 810 pipe was made at a time when he was unquestionably aware that the 810 pipe had,

in fact, been capped. Thus, the jury's finding of guilt on the perjury charge is supported by sufficient evidence.

(e) Sufficiency of the Evidence of Obstruction of the Administration of Law

The defendant alleges that there was insufficient evidence to prove that he used force, threats or power. The language of the statute, however, is much broader.

Obstructing Administration of Law is defined in 18 Pa.C.S. §5101 as follows:

> A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with a crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

The evidence, as set forth at length above, established beyond a reasonable doubt that the defendant altered the pipes comprising the underground monitoring system for the Phase I pit. The defendant's purpose in doing so was to deceive the DER inspectors by causing them to believe that the level of contamination emanating from the Phase I pit had dropped markedly. Further, the evidence also showed that when questioned by DER personnel concerning the decreased level of contaminants, the defendant did not inform them of the alteration of the

810 pipe; rather, the defendant responded that the problem had cleared itself up naturally, as he predicted it would. The result of the defendant's deception was that the DER was unable to carry out its governmental duty to monitor the groundwater in the vicinity of the Phase I pit. Thus, the defendant physically – albeit, not violently – interfered with the governmental functions of the DER. The defendant's conduct falls squarely within the category of conduct proscribed by §5101 and, therefore, the jury's finding of guilt on this charge is supported by sufficient evidence.

VII.

The defendant alleges that the evidence proffered by the Commonwealth during his final trial was insufficient to sustain his convictions in the within matter.

As we have previously stated the applicable case law concerning a challenge to the sufficiency of the evidence in Section VI, we will not reiterate it at this juncture, but merely incorporate it herein by reference.

(a) Count One and the Statute of Limitations

The defendant alleges that Count One of the criminal Information was not proven within the Statute of Limitations. As we discussed thoroughly in Section V, the defendant's allegation is based on his assertion that the applicable Statute of Limitations is two years. On the contrary, the applicable Statute of Limitations is twenty years. Accordingly, as indicated in Section V, we find this argument to be without merit.

(b) Counts One, Two and Three – Possession of a Permit for the Disposal of Leachate

The defendant alleges that the evidence was insufficient to prove that he operated a hazardous and/or residual waste disposal facility without a permit from the Pennsylvania Department of Environmental Resources (DER) for such facility.

In essence, the defendant contends that he possessed a permit issued by the DER for his waste disposal facility during the time that he or his employees conducted the above-ground pumping activities, and that the existence of that permit constitutes an absolute defense to the charges. As in Section VI, we find the defendant's contention unpersuasive.

The permit issued by the DER authorizes specified disposal activities which are to be conducted in accordance with the facility design plans and specifications submitted with the permit application. As in the defendant's first trial, the manner in which permit applications are prepared, submitted, evaluated and approved or denied by the DER was explained via the testimony of Dan Peterson, an operations supervisor in the Pittsburgh Region of the Bureau of Solvent Management. Mr. Peterson stated that the applicant would submit a permit application to the DER. This application would be reviewed and evaluated by various technicians including engineers and scientists. After meetings between the parties and modifications (if necessary) to the modules, the permit would either be granted or denied (N.T. 6/17/86, pp. 99-100). Mr. Peterson also explained the procedure for

the approval of a Module 1 application. The Module 1 form used by an applicant for purposes of receiving authorization from the DER to accept certain stated waste streams for disposal in the applicant's waste facility (N.T. 6/17/86, p. 100).

With regard to the defendant's facility in Elizabeth Township, Allegheny County, Mr. Peterson testified that the defendant was issued a permit in 1979 for the Municipal and Industrial Disposal Company (MIDC). The MIDC facility contained three sites, denoted Site A, Site B (the Phase I pit), and Site C (the demolition site) (N.T. 6/17/86, pp. 102-105).

Mr. Peterson defined the term "leachate" as follows: "Leachate is a liquid waste which is generated when surface water or ground water or rainfall mixes with the solid waste. This water dissolves or absorbs some of the soluble fraction of the solid waste, removing and carrying it away. The leachate takes on the characteristic of the waste, of the solid waste which it is generated from." (N.T. 6/17/86, p. 122). At the defendant's Phase I pit, leachate would be formed by the mixing of rainfall with the wastes which were contained in the pit (N.T. 6/17/86, p. 123).

According to the defendant's permit, the defendant was not permitted to discharge leachate from his facility (N.T. 6/17/86, p. 122). Specifically, Paragraph H of the permit states that all leachate and surface water which accumulates in the pit must be removed. Initially, the leachate was to be removed and treated at a U.S. Steel facility. Subsequently, the defendant received permission

to transport the leachate for treatment at a DuPont plant in Delaware (N.T. 6/17/86, pp. 132-134).

The testimony of several former employees of the defendant indicated definitively that rather than transport the leachate to either of the approved treatment facilities, the defendant chose to dispose of the leachate by pumping it out of the Phase I pit into a tributary of the Youghiogheny River.

Carl Meetze, who worked for the defendant from October, 1980, until December, 1982, stated that he and Theodore Opfar would place a pump at the wateredge of the pit, connect a hose to the pump, and direct the hose over the dike into the tributary (N.T. 6/17/86, pp. 292-293). He participated in pumping the leachate ("the dirty waste water"), usually at night or on weekends, out of both the temporary pit and the Phase I pit "between 15 and 20 times." (N.T. 6/17/86, pp. 298, 302-303). Mr. Meetze described the appearance of the creek during and after the discharge as follows: "It would be dirty. Sometimes looked oily. And sometimes later on it would start foaming, making a dirty looking foam up around the bank." (N.T. 6/17/86, p. 299). Mr. Meetze further testified that the defendant directed the pumping activity on occasion, saw the pump actually running, and saw the leachate being discharged into the tributary (N.T. 6/17/86, pp. 304, 334-335). In fact, the defendant contacted Mr. Meetze after he quit the defendant's employ and requested that Mr. Meetze tell the DER that Theodore Opfar "took care of all the water." (N.T. 6/17/86, pp. 305-308).

Mr. Meetze's testimony concerning the pumping activity was corroborated by the testimony of four other

employees of the defendant. Michael Toth and William Baird testified that they saw the pump being operated on several occasions (N.T. 6/17/86, pp. 412-415, 431-432). David Ross stated that he not only witnessed the pumping activity, he actually operated the pump on one occasion (N.T. 6/17/86, pp. 462-464). Tracy Opfar stated that he operated the pump about 20-25 times with the help of his father, Theodore Opfar (N.T. 6/17/86, pp. 547-549).

The foregoing testimony clearly indicates that the defendant failed to operate his disposal facility in accordance with the provisions of his permit. The permit prohibited the defendant from discharging leachate. Paragraph H specifically required the defendant to dispose of the leachate by transporting it to a named treatment facility. Rather than do so, the defendant willfully and deliberately chose to pump the leachate out of the disposal pits into the tributary which led to the Youghiogheny River. The defendant's actions in so doing represented such a significant departure from the terms of the existing permit that the operation of the waste facility was "un-permitted." Accordingly, contrary to the defendant's contention, he did not possess all necessary permits; specifically, he did not possess a permit which permitted the discharge of leachate.

(c) Counts Four and Five – Possession of a Permit for Wastes from Ohio Barge Lines

The defendant contends that he possessed the necessary permit to allow him to dispose of solid wastes generated by Ohio Barge Lines.

Raymond Gee, the manager of vessel maintenance for Ohio Barge Lines from 1980-1983, testified that the operation of barges on the river generated two types of wastes – engine oil and grease – which were collected in 120-pound kegs (N.T. 6/17/86, P. 358).

Michael Toth, who was employed as a truck driver for the defendant, testified that he hauled waste materials from Ohio Barge Lines to the MIDC facility on two occasions. Mr. Toth identified Commonwealth's Exhibits 18-E and 15-F as roll-off cards dated December 15, 1981, and December 10, 1981, indicating that shipments of grease in barrels were picked up and hauled away from Ohio Barge Lines on these dates (N.T. 6/17/86, pp. 404-406). Mr. Toth stated that both of these shipments of grease were dumped into the demolition site and buried (N.T. 6/17/86, p. 404).

Earlier testimony by Dan Peterson indicated that only the Phase I pit – not the demolition site – was permitted to accept this type of industrially generated waste (N.T. 6/17/86, PP. 103, 107). Thus, the Commonwealth has met its burden of establishing beyond a reasonable doubt that the defendant disposed of solid waste in an area of his facility which was not permitted to accept such waste; and therefore, the defendant's argument is rejected as meritless.

(d) Counts Six through Forty-Nine – Disposal of Wastes from Conoco Coal Contrary to Defendant's Permit

The defendant contends that he had prior witten [sic] approval for the disposal of residual wastes from Conoco Coal.

Paragraph G of the defendant's permit (Commonwealth's Exhibit 2) states as follows:

> (g) Industrial Waste Disposal at Permitted Sites – Module 1 must be completed and submitted to the department for each and every waste which is proposed for disposal in the Phase I pit. Prior written approval must be obtained for the the [sic] disposal of each waste in the Phase I pit.

According to the testimony of Roy Scandrol, a mechanical services supervisor for Conoco Coal, Conoco Coal contracted with the defendant for the removal of residual wastes from a black water pond on Conoco's property (N.T. 6/17/86, pp. 238-240). The wastes were removed between December 9, 1981, and January 25, 1982 (See Commonwealth Exhibits 17-E through 17-VV).

The testimony of Dan Peterson indicated that the defendant received a Module 1 approval from the DER for the disposal of residual wastes from Conoco in September, 1982 – approximately eight months after the disposal project had been completed (N.T. 6/27/86, p. 150). Thus, at the time the defendant hauled the wastes and disposed of them at his MIDC facility, his existing permit did not allow the disposal of this waste from this generator (i.e., Conoco Coal). Accordingly, the Commonwealth has established its charge that the defendant acted contrary to his permit in accepting this residual waste.

We note that we have considered and rejected the defendant's argument that prior approval for similar coal wastes from other generators satisfied the permit requirements. Paragraph G of the permit is very clear that the permittee must obtain prior approval for "each and every waste" proposed for disposal. It does not say 'each and

every waste that is not similar to a waste previously approved.'

(e) Counts Fifty and Fifty-One – Possession of a Permit for Wastes from U.S. Steel-Edgar Thompson Works

The defendant alleges that he possessed the necessary permit for disposal of wastes from U.S. Steel-Edgar Thompson Works (USS-ET).

Dan Peterson testified that he searched the DER records and found no Module 1 approval for the Phase I pit for the disposal of grease boxes from USS-ET (N.T. 6/17/86, P. 155).

David Ross stated that in December, 1981, a load of grease was hauled from USS-ET and dumped into the Phase I pit. Mr. Ross stated that the defendant told him not to tell anyone at USS-ET that they did not have a permit to haul this grease (N.T. 6/17/86, p. 460-461).

This testimony by the Commonwealth's witnesses establishes that the defendant did, in fact, permit the disposal of these residual wastes without having received prior DER approval via the submission of a Module 1 application. Thus, the defendant's argument to the contrary is meritless.

(f) Counts Fifty-Four and Fifty-Five – Disposal of Residual Wastes at an Alternate Location without a Permit

The defendant alleges that as he did not own the property at this alternate location in Rostraver Township,

Westmoreland County, he was not required to have a permit to dispose of wastes there.

The evidence of disposal of lime wastes at this location in Rostraver Township (referred to as "the Fedorka farm") was provided via the testimony of former employees David Ross, William Baird, and Eustace Walters. Mr. Ross testified that the defendant told him to dump the lime and sewage ash which had been hauled from McKeesport Sewage Treatment Plant at the Fedorka farm in Rostraver Township, Westmoreland County (N.T. 6/17/86, pp. 461-462). Both Mr. Baird and Mr. Walters testified that they were truck drivers and they dumped loads of lime/sewage ash at the Fedorka farm (N.T. 6/17/86, pp. 429, 537).

Our evaluation of the defendant's argument, which is supported by neither statutory nor case authority, leads us to the conclusion that it is without merit. To find otherwise would be ostensibly to condone the defendant's dumping of wastes on another person's property and thereby insulating himself from criminal charges. The fact is, the defendant disposed of the waste without a permit to dispose of it at the location he designated for disposal. This is the gravamen of the crime.

(g) Lack of Adequate Evidence of Waste Discharge

The defendant alleges that the Commonwealth failed to present sufficient evidence that he actually discharged wastes.

Contrary to the defendant's assertion, the Commonwealth presented overwhelming evidence that the defendant actually discharged wastes. As indicated above, several of the defendant's former employees testified that they either witnessed or participated in the actual pumping of leachate from the Phase I pit into the tributary to the Youghiogheny River. In addition, and at least as significantly, the Commonwealth called Gregory Farrell, a professional engineer who was qualified as an expert. Mr. Farrell testified that he was assigned by his employer, Roy F. Weston, Inc., to calculate the level of materials that should have been in the Phase I pit on November 26, 1984 (i.e., the date that an aerial photograph – Commonwealth's Exhibit 29 – was taken), based upon the defendan 's manifests of what was dumped into the pit, eva, tion, water seepage, etc. According to Mr. Farrell's calculations, as of November 26, 1984, the pit should have contained 53,082 cubic yards of waste and water (N.T. 6/17/86, p. 574). In actuality, according to Mr. Farrell, the actual amount of waste and water in the pit on November 26, 1984, was 47,111 cubic yards – a difference of 5,971 cubic yards or 1,205,903 gallons (N.T. 6/17/86, p. 575).

This testimony of the Commonwealth's expert in conjunction with the testimony of the defendant's employees convinced us beyond a reasonable doubt that the defendant did actually discharge wastes – both residual and hazardous – from the Phase I pit without a permit to do so. Accordingly, we find the defendant's argument to be meritless.

(h) *DeMinimus* Infraction

The defendant alleges that his actions in the present matter constitute, at best, a *deminimus* infraction of the applicable statutes due to the Commonwealth's failure to prove any actual pollution, and, therefore, any actual harm.

We note initially that the defendant was not specifically charged with the provisions of the Solid Waste Management Act and the Clean Streams Law concerning pollution. Thus, the Commonwealth was not required to prove any instances of pollution to establish every element of the crimes with which the defendant was charged and convicted.

However, putting this aside, we find that the defendant's willful and intentional actions in this matter are far from *deminimus* in nature. Rather, they are major violations of very important legislation promulgated to protect not only each one of us, but the flora and fauna which enrich our lives and environment. The defendant's wanton interference with our environment is deplorable and for us to excuse it as *deminimus* would be, in effect, a judicial endorsement of this conduct.

VIII.

Finally, the defendant alleges that the sentence we imposed is illegal and excessive.

On April 10, 1987, we sentenced the defendant to serve a total period of incarceration of not less than six years nor more than twelve years, a concurrent twenty-five year period of probation, and a fine of $200,000.

Regarding the legality of the sentence, the defendant appears to allege that the sentence is illegal because the defendant was wrongfully convicted based on the reasons set forth in his post-trial motions. This is not the basis for assessing the legality of a sentence. Rather, the legality of a sentence concerns considerations such as exceeding the statutory limit, failing to merge certain offenses, failing to state adequate reasons on the record, etc. None of these considerations is present in the within case. Our sentence is well within the statutory limits and we gave several reasons for imposing this specific sentence. Accordingly, we believe that our sentence is lawful and appropriate.

The imposition of sentence is within the sound discretion of the sentencing judge. *Commonwealth v. Jackson*, 336 Pa. Super. 609, 486 A.2d 431 (1984). A sentencing court does not abuse its discretion unless it: (1) erroneously applies the guidelines, (2) imposes a sentence within the guidelines that is "clearly unreasonable," or (3) imposes a sentence outside the guidelines which is "unreasonable." *Commonwealth v. Drumgoole*, 341 Pa. Super. 468, 491 A.2d 1352 (1985); 42 Pa.C.S.A. §9781(c).

Further, a sentence must either exceed the statutory limits or be manifestly excessive to constitute an abuse of discretion. *Commonwealth v. White*, 341 Pa. Super. 261, 491 A.2d 252 (1985). "A sentencing judge's discretion must be accorded great weight as he is in the best position to weigh various factors such as the nature of the crime, the defendant's character, and the defendant's displays of remorse, defiance, or indifference." *Commonwealth v. Fries*, ___ Pa. Super. ___, 523 A.2d 1134 (1987).

As required at the time of this sentencing, we consider the sentencing ranges as set forth in the Sentencing Guidelines. In rejecting these guidelines, we stated on the record several reasons for our sentence.

First, the defendant was convicted of several serious violations of the Solid Waste Management Act (SWMA). In addition, the defendant was convicted of committing perjury in connection with a proceeding before the Commonwealth Court.

Secondly, rather than sentencing the defendant to consecutive periods of incarceration on all or most of the individual counts of which he was convicted, we sentenced him to a period of incarceration on only three counts which dealt with totally separate incidents.

The defendant was convicted of sixty counts of violating criminal sanctions of the Solid Waste Management Act and other criminal statutes. We sentenced the defendant on only three of these counts. At Count 1 (Trial 1) (original Count 5), we sentenced the defendant to a period of incarceration of two and one-half to five years and ten years probation. The gravamen of this Count was the deliberate alteration of the groundwater monitoring system which risked the seepage of hazardous wastes into the aquifer. At Count 5 (Trial 1) (original Count 10), lying under oath before the Commonwealth Court, we sentenced the defendant to a consecutive period of incarceration of one to two years and five years probation. At Count 2 (Trial 2) (original Count 2), we sentenced the defendant to a further consecutive period of incarceration of two and one-half to five years and ten years probation. The gravamen of this Count was the above-ground

pumping of hazardous wastes into an unnamed tributary of the Youghiogheny River. The total sentence imposed was a period of incarceration of six to twelve years. In addition, we ordered the defendant to pay the following fines: $100,000 at Count 1 (Trial 1), and $100,000 at Count 2 (Trial 2).

Thirdly, we disagree strongly with the defendant's contention that his crimes were "victimless." Rather, we are all, at the very least, potential victims. The evidence demonstrated convincingly that the defendant willfully discharged over a million gallons of hazardous waste and residual wastes into a tributary of the Youghiogheny River. We will never know the extent of the harm caused, but it is absolutely clear that this conduct threatened serious harm.

Fourthly, the defendant's actions demonstrate that he had absolutely no concern whatsoever for the citizens who live in the area of his disposal facility. His behavior in dumping both hazardous and residual wastes into our waterways shows a complete indifference toward his fellow citizens. In fact, his behavior rises to the level of callous disregard for the health and safety of his neighbors and their environment.

Fifthly, the defendant's behavior was not inadvertent and unintentional. Rather, his behavior in subverting the safeguards put in place to protect our environment by diverting the discharge from the 810 pipe was intentional and wanton.

Finally, in our opinion, the defendant is a very dangerous man. He has engaged in behavior which poses a serious risk to the health and safety of the community by

deliberately discharging hazardous wastes into an unnamed tributary of the Youghiogheny River. Also, he altered the monitoring system in such a way as to risk the danger of the discharge of hazardous waste into the aquifer.

We find that the defendant's behavior is reprehensible and to impose a less severe sentence than the present one would be to condone this abhorrent conduct. Accordingly, we believe that the sentence imposed herein is neither unlawful nor an abuse of our discretion, nor excessive under the circumstances.

Conclusion

For the foregoing reasons, we find that the defendant is not entitled to a dismissal of the charges, an arrest of judgment, a new trial, and/or a reduction in his sentence.

/s/ Novak, J.
NOVAK, J.

IN THE SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PITTSBURGH

NO. 485 PITTSBURGH 1988

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM FIORE,
APPELLANT

BRIEF FOR APPELLANT

APPEAL FROM JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, CRIMINAL DIVISION, C.C. NO. 8508740 AS ENTERED APRIL 10, 1987

MARTIN W. SHEERER, ESQUIRE

MARTIN W. SHEERER
& ASSOCIATES
P.O. Box 38246
Pittsburgh, PA 15238
(412) 782-5400

TABLE OF CONTENTS

		Page
Table of Contents		i
Table of Citations		iii
Statement Of Jurisdiction		1
Order In Question		2
Statement Of Questions Involved		5
Statement Of The Case		8
Summary of Argument		13
Argument for Appellant		
I.	Rule 1100 Was Violated By The Commonwealth And The Court Erred In Granting The Commonwealth's Petition To Extend	15
II.	Unconstitutionality Of Section 606 Of The Solid Waste Management Act And The Unconstitutional Application Thereof To Appellant	21
III.	Unconstitutional Delegation Of Legislative Authority Or Acting Beyond Delegated Authority	28
IV.	The Statute Of Limitations Bars Prosecution Of Trial Two, Counts 4-51, 54 And 55	38
V.	Appellant Had The Necessary Permits	40
VI.	All Charges Should Be Dismissed As Deminimus Infractions Under 18 Pa.C.S. § 312(a)	50
VII.	The Trial One Evidence Is Insufficient On All Counts Re The Altered Pipe	58

VIII. The Trial Two Evidence Is Insufficient On All Counts Re Pumping (Counts 1, 2 and 3) 69

IX. The Trial Two Evidence Is Insufficient On All Counts Re Acceptance Of Wastes (Counts 4-5, 6-49, 50-51, 54 And 55) 73

X. The Office Of Attorney General Lacked Investigative And Prosecutorial Authority..... 80

XI. The Multicounty Investigative Grand Jury Lacked Jurisdiction And Proceeded Unlawfully In Making Presentment Against Appellant 84

XII. Excessive Sentence; A Manifest Abuse Of Discretion Violating The Sentencing Guidelines Of Pennsylvania And The United States 91

Conclusion 95

Appendix

Photo of Appellant's Solid Waste Disposal Facility ... A-1

Appellant's Permit For Solid Waste Disposal Facility Permit No. 300679 Issued 3-24-80 (Com. Exh. 2) A-2

Complaint Form PA Fish Commission..... A-10

Transcript Excerpt – December 13, 1988 ..... A-11

Commonwealth Attorney's Act §732-205..... A-16

18 Pa.C.S. §306 – Conduct of Another..... A-17

18 Pa.C.S. §5101 – Obstructing Justice A-18

18 Pa.C.S. §4902 – Perjury A-19

SWMA §§301, 302, 401, 404, 405, 501, 606..... A-20

CSL §§301, 307, 602 ..... A-23

DER Regulations – 75 Pa.Code 75.278, 279, 264, 265..... A-25

18 Pa.C.S. §312 – DeMinimus Infractions..... A-32

Opinion

* * *

STATEMENT OF THE QUESTIONS INVOLVED

1. Was Rule 1100 Violated By The Commonwealth And Did The Court Err In Granting The Commonwealth's Petition To Extend?

   Answered in the negative below.

2. Whether Section 606 Of The Solid Waste Management Act Is Unconstitutional And Its Application Unconstitutional?

   Answered in the negative below.

3. Whether There Was An Unconstitutional Delegation Of Authority To Authorize An Administrative Agency Or Its Personnel To Define Crimes In Rules And Regulations And Permit Terms And Conditions And Whether The Delegated Authority Was Unconstitutionally Exceeded?

   Answered in the negative below.

4. Whether The Statute Of Limitations In the Solid Waste Management Act Is Unconstitutional And Whether This Prosecution Is Barred By The Applicable Statute of Limitations?

   Answered in the negative below.

5. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Violation Of The Solid Waste Management Act, Section 401(a), A Felony 2 Under Section 606(f) – (Count One, Trial One)?

   Answered in the negative below.

6. Whether The Evidence Is Insufficient To Support A Verdict of Guilty Of Violation Of The Clean Streams Law, Section 301, 307, A Misdemeanor 3 Under 35 P.S. 691.602(b), 18 Pa.C.S. 306 – (Count Two, Trial One)?

   Answered in the negative below.

7. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Violation Of The Solid Waste Management Act, Section 401(a), A Felony 2 Under Section 606(f) – (Count Three, Trial One)?

   Answered in the negative below.

8. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Violation Of The Solid Waste Management Act, Section 302(a), A Misdemeanor 3 Under Section 606(f) – (Count Four, Trial One)?

   Answered in the negative below.

9. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Perjury, 18 Pa.C.S. §4902, A Felony 3 – (Count 5, Trial One)?

   Answered in the negative below.

10. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Obstruction Of Justice, 18 Pa.C.S. §5101, A Misdemeanor (Count Six, Trial One)?

    Answered in the negative below.

11. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Conspiracy, 18 P.a.C.S. 903, (Count Nine, Trial One)?

    Answered in the negative below.

12. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Violation Of The Clean Streams Law, Section 301, 307, A Misdemeanor 3 Under Section 602(b) – (Count One, Trial Two)?

    Answered in the negative below.

13. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Violation Of The Solid Waste Management Act, Section 401(a) A Felony 2 Under Section 606(f) – (Count Two, Trial Two)?

    Answered in the negative below.

14. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Violation Of The Solid Waste Management Act, Section 302(a), A Misdemeanor 3 Under Section 606(b) (Count Three, Trial Two)?

    Answered in the negative below.

15. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Two Counts Of Violation Of The Solid Waste Management Act, Section 501(a), A Misdemeanor 3 Under Section 606(b) – (Counts Four and Five, Trial Two)?

    Answered in the negative below.

16. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Forty-Five Counts Of Violation Of The Solid Waste Management Act, Section 302(a), A Misdemeanor 3 Under Section 606(b) – (Counts Six Through Forty-Nine, Trial Two)?

    Answered in the negative below.

17. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Two Counts Of Violation Of The Solid Waste Management Act, Section 301, A Misdemeanor 3 Under Section 606(b) – (Count's Fifty And Fifty-One, Trial Two)?

    Answered in the negative below.

18. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Two Counts Of Violation Of The Solid Waste Management Act, Section 301, A Misdemeanor Under Section 606(b) – (Count's Fifty-Four And Fifty-Five, Trial Two)?

    Answered in the negative below.

19. Whether The Charges Should Be Dismissed As De Minimus Infractions Pursuant to 18 Pa.C.S. §312?

    Answered in the negative below.

20. Whether The Attorney General Lacked Authority To Investigate And Prosecute This Case?

    Answered in the negative below.

21. Whether The Multi-County Investigating Grand Jury Lacked Jurisdiction And Proceeded Unlawfully In Making A Presentment Against Appellant?

    Answered in the negative below.

22. Whether The Sentence Of The Court Is Excessive?

    Answered in the negative below.

• • •

V. APPELLANT HAD THE NECESSARY PERMITS

A. SWMA Facility Permit

On March 24, 1980 Appellant received a solid waste disposal facility permit from the DER. Permit No. 300679 was issued to Appellant for the site in question and was in effect until suspended by the DER in Fall 1983. The evidence of violations here relate to times when the permit was in effect. See Commonwealth Exhibit No. 2 (both trials) – attached to this brief.

The second degree felony charges on which Appellant was convicted and sentenced are alleged violations of the Solid Waste Management Act Section 401(a), which reads as follows:

> "(a) No person or municipality shall store, transport, treat, or dispose of hazardous waste within this Commonwealth unless such storage, transportation, treatment, or disposal is authorized by the rules and regulations of the Department; *no person or municipality shall own or operate a hazardous waste storage, treatment or disposal facility unless such person or municipality has first obtained a permit for the storage, treatment and disposal of hazardous waste from the Department;* and, no person or municipality shall transport hazardous waste within the Commonwealth unless such person or municipality has first obtained a license for the transportation of hazardous waste from the Department." (Emphasis added.)

The word "permit" is not defined in Section 103, the definitions section, or anywhere else in the Act. A review of the Act in general makes it clear that the "permit" in

this situation refers to the document by which a person comes under the jurisdiction of the DER as the owner and operator of a site where solid waste is disposed. The permit issued to Appellant is entitled "Permit for Solid Waste Disposal and/or Process Facility." It designates the site and the facility permitted upon that site to be used for disposal of hazardous waste. A person operating a site for this purpose has one permit. SWMA Section 606(f) classifies a violation of 401 as a felony of the second degree. Actions alleged to be contrary to a permit are dealt with under paragraphs (a) and (b) of Section 606 as summary offenses and misdemeanors. Obviously, the legislative intent was to make it a felony for someone to engage in this business who had not brought themselves under the jurisdiction and supervision of the law and the regulating agency.

Count 1 and Count 3 in Trial One regarding the pipe and Count 2, Trial Two regarding pumping are charged as violations under Section 401(a) and thus as felonies of the second degree. They all state that Appellant "did some act without having first obtained a permit from the DER for such disposal facility." It is clear in the language of the charges that the permit being referred to is the permit for the facility, not any other type of license or approval which might be required by regulation or otherwise.

The prosecution used the word "permit" throughout the trial without definition and interchangeably with such words as "approval" and "license" for the purpose of trying to stretch this case into a felony case. The charges under Section 401(a) must fail for this obvious reason.

In Trial One, the Court instructed the jury that they could consider as fact the question of whether Appellant had so significantly departed from the terms of the permit that the operation of the facility then became an unpermitted operation. This jury instruction is discussed as a separate issue in this Brief. The Statutory Construction Act and all reasonable rules of construction lead to only one reasonable conclusion. Appellant had a permit. The permit referred to in SWMA Section 401(a) is the kind of permit that Appellant had. The Commonwealth can allege that Appellant violated his permit and go about proving violations or actions contrary to the permit, but here the prosecution has distorted the language and scheme of the statute.

The term "permit" is nowhere defined in the SWMA. To extrapolate a definition of "permit" as intended by the legislature under the SWMA one must refer to permit application requirements at 35 P.S. 6018.502(a). In this section it becomes clear that a permit is a single document issued upon application that included plans, designs and other relevant data prepared by a registered professional engineer. The permit clearly applies to a whole facility as indicated in 502(b) in requiring that a form be recorded at the office of recorder of deeds. It is further indicated that a permit is a single document in that it requires a bond and is issued only one time.

The Code at 25 Pa.Code 75.260 defines a permit as a written document issued by the Department under the Act which authorizes the recipient to undertake the treatment, storage or disposal of hazardous waste under the act. The term does not include interim status or a permit

which has not been subject to final action, such as a draft permit or a proposed permit.

Interim status was a program developed to accommodate waste disposal during the interim period until new hazardous waste facilities could be developed. Pub. L. No. 96-482 § 7, 29, 94 Stat. 2336, 2349. To qualify for interim status an operator had to notify the Department of the location and description of such activity and the identified or listed hazardous wastes handled by such person. Not more than one notification shall be required to be filed with respect to the same substance. 35 P.S. 6018.501. The transition scheme or interim status is described at 35 P.S. § 6018.404. To qualify, a facility had to be in existence on the effective date of the act; it had to comply with 501 already discussed; it had to make an application for a new permit under the act; and had to operate in a manner consistent with the objectives of the act. If these requirements were satisfied the facility was treated as having a permit until final departmental action on such application is made. It should also be noted that the SWMA included the savings clause in Chapter 29 stating:

> Section 1001 of Act 1980, July 7, P.L. 380, No. 97, provides: "The act of July 31, 1968 (P.L. 788 No. 241), known as the "Pennsylvania Solid Waste Management Act," is hereby repealed: Provided, however, that all permits and orders issued, municipal solid waste management plans approved, and regulations promulgated under such act shall remain in full force and effect unless and until modified, amended, suspended or revoked."

In this case Appellant possessed Permit No. 300679 issued on 3-24-80 for the operation of the Phase I industrial waste pit. (R.213). The new SWMA became effective on September 7, 1980. The DER did not obtain primacy in environmental matters until January 1986 under the Federal Resource Conservation and Recovery Act (RCRA). 51 Fed. Reg. 1791 (Jan. 15, 1986). Prior to that time the Environmental Protection Agency (EPA) maintained jurisdiction over disposal sites. In this regard Appellant promptly satisfied the interim status requirements of both the SWMA and RCRA by notifying the proper authorities and submitting a Part A application. Appellant continued under interim status until August 4, 1983 when his 1980 permit was suspended by DER.

Appellant enjoyed two distinct authorities to operate under the SWMA. The first is that his 1980 permit remained in full force and effect under the "savings clause" of the SWMA until it was suspended on August 4, 1983. The second was the interim status he obtained under 35 P.S. 6018.403 of the SWMA which requires that he shall be treated as having been issued a permit. Consequently, all counts alleging that Mr. Fiore operated a waste disposal facility without a permit must fail because he had the ONLY permit or interim authority that could be obtained under the SWMA for such facility.

Appellant also possessed several different permits to discharge industrial wastes issued under the Clean Streams Law, 35 P.S. 691.1 et seq. The permits in force during the time period in question were: #0046663 (issued April, 1979; expired April, 1984), "0091715 (issued October, 1980; expired October, 1985), #00466655 (issued April, 1979; expired April, 1984), and #PA0046655 (issued

December, 1983; expired April, 1984). The more recent permit consolidated the prior three. (R. 2095-2114).

B. Clean Streams Law Permits

The National Pollution Discharge Elimination System (NPDES) permits were issued for various discharge points located on the site. This case has made several references to a manhole. (R. 249-251). The discharges from this manhole were permitted by NPDES permit numbers: PA0046663 or PA0046655 (2g & 2h). As verified by Sam Harper, Department of Water Quality, Bureau of Water Quality Management, water quality specialist supervisor, Site B's 1983 permit included outfalls 005 (PA0091715, Outfall 001, 1980), 006 (PA0091715, 002, 1980), 007 (711 in manhole, 011 in PA0046663, 1979), 008 (810 in manhole, 010 in PA0046663, 1979). (R. 469).

The pipes in the manhole were consistently referred to as 711 and 810 throughout the trials. This terminology is a clear misnomer because pipes, in and of themselves, are not permitable under the Clean Streams Law. It is the discharges for which Clean Streams Law permits (NPDES) are issued. These discharges are permitted at a certain point. In this case, into the manhole pipe leading to the unnamed tributary of the Youghiogheny River. The discharges into the unnamed tributary were permitted and the counts brought under the Clean Streams Law must fail.

It should be added that many of the charges against Appellant allege that he disposed of hazardous or residual wastes by above ground pumping without a permit in

violation of the SWMA. There is only one type of permit issued under the SWMA. This is a permit to operate a disposal facility. Mr. Fiore possessed such a permit #300679 issued on 3-24-80 and was also on interim status. Any discharges that may have occurred from the facility would have to be permitted under the Clean Streams Act. As has already been discussed the NPDES permits were directed toward such discharge. As a result, the charges alleging disposal by pumping must fail under the SWMA since no other permit exists or can be obtained under that statute.

The Commonwealth has argued that the existence of a permit does not constitute a defense because (1) permits are issued according to design plans and specifications submitted with the application and (2) the activity was so outside the scope of the sanctioned activity that the appellant, in effect, had no permits.

First, the SWMA specifically requires one disposing of waste to "first obtain a permit." 35 P.S. 6018.501. Once a permit is issued, the facility may continue to operate under that permit until action by the DER to suspend or revoke it for various reasons. 25 Pa.Code § 75.278. The Commonwealth concedes that the DER has exclusive authority to revoke permits and that this authority may not be usurped by judge or jury. A variation from the plans or designs may warrant a revocation but activity done prior to the revocation is done with a permit. All activity in this case was done prior to the permit being suspended or revoked.

Second, a permit under the SWMA is issued for a "facility." 35 P.S. § 6018.301, 401. A facility is defined as

all land, structures and other appurtenances or improvements on a property where waste is treated, stored or disposed. 25 Pa.Code § 75.260. Any activity conducted at such facility while validly permitted is conducted with a permit. However, where the activity is outside or off the facility, it is not permitted under the particular SWMA permit. The only activity alleged to have occurred off the permitted facility is related to the lime and sewage used as fertilizer on a sod farm. (Trial Two, Counts 54 and 55). All other activity was conducted at the permitted facility while properly permitted.

Consider an analogy of one licensed to operate a motor vehicle. A vehicle operator may commit a serious offense, e.g. homicide, while operating the vehicle. This individual may certainly be charged with that serious offense, but may not be charged or convicted of operating a vehicle without a license. This hypothetical person may be punished by revoking or suspending his license but he *cannot* be convicted ex post facto of operating the vehicle without a valid license. This same reasoning applies here. The appellant had a SWMA permit to operate the facility and may not be convicted of operating it without a permit.

Finally, the Commonwealth confuses the application of permits issued under the Clean Streams Law with those issued under the SWMA. The sole authority on which the Commonwealth relies for the proposition that activity outside the scope of permit is, in essence, without a permit is *DER v. Fleetwood Borough Authority*, 21 Pa. Commonwealth Ct. 349, 346 A.2d 867 (1975).

It is fully understood that the Clean Streams Law permits apply to a "point source" discharge. *Fleetwood* was under the Clean Streams Law which applies exclusively to discharges and effluent limitations. That decision ignores Section 307(c) of the Clean Streams Law which recognizes discharge "contrary to the terms of a permit." That as opposed to discharge without a permit. Appellant always had a permit for discharge. Conversely, the SWMA permit applies to a whole facility. § 6018.301, 401. It authorizes disposal operations. Accordingly the Applicant was permitted to and did operate the facility after obtaining a permit.

In summary, Appellant possessed a SWMA permit to operate the facility and the necessary NPDES permits to discharge industrial waste under the Clean Streams Act. No other permits were required or could be obtained under the SWMA. Consequently, all counts based on the SWMA having as an element the doing of an act without a permit must fail.

For this reason alone, all counts alleging that Appellant acted without a permit (Counts 1, 2, 3 and 4 of Trial One and all Counts of Trial Two) must be dismissed.

VI. ALL CHARGES SHOULD BE DISMISSED AS DEMINIMUS INFRACTIONS UNDER 18 Pa.C.S. § 312(a).

All of the charges should be dismissed as *Deminimus infractions* under 18 Pa.C.S. § 312(a).

The statute reads as follows:

> (a) General Rule – The court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of attendant circumstances, it finds that the conduct of the defendant:
>
> > (1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;
> >
> > (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
> >
> > (3) presents such other extenuations that it cannot reasonably by [sic] regarded as envisaged by the General Assembly or other authority in forbidding the offense.

The statute does not create discretion in the Court. It says, "The court *shall* dismiss a prosecution . . . " The statute mandates dismissal upon any one of certain findings being made on the charges, the evidence and the circumstances.

In *Commonwealth v. Gennelli* 474 A.2d 294, 326 Pa.Super, 388 (1984), in reversing the trial court's dismissal of charges, Judge Johnson nevertheless rejected the Commonwealth's argument that the trial court erred by sua sponte raising the deminimus issue, as follows:

> The Commonwealth's first argument concerning this issue is meritless, as neither the statute nor

> case law requires a defendant to preserve the issue of de minimus infractions by means of inclusion in an omnibus motion. On the contrary, the language of the statute *requires* the trial court to dismiss the prosecution on its own accord, upon a determination that the defendant's conduct involved de minimus infractions. (Emphasis added).

The court must dismiss a prosecution if it finds that the charge falls into the statutority [sic] defined "de minimus" category. See *Commonwealth v. Kindness*, 371 A.2d 1246, 1250, N.5, 247 Pa.Super. 99, 107, N.5 (1977) (dictum).

The law defines "de minimus" in three separate numbered categories. If the case falls into any one of these, the court is required to dismiss it.

Appellant submits that dismissal of all charges in this case is dictated under each of the three paragraphs.

Appellant submits that this court should find that the trial court erred and now order all charges dismissed.

Due to the mandatory language and the absence of a limitation on the mandate, it appears that this appellate court may and should directly judge the case on the record presented without limitation to a test of review of the trial court's action. In any case, since the statute is mandatory, and not discretionary, the test is not the trial judge's abuse of discretion.

All of the charges in this case relate to activities under the Solid Waste Management Act (35 P.S.

§ 6018.101 et seq.) and the Clean Streams Law (35 § 691.1 et seq.).[1]

The common purpose of these regulatory statutes, simply stated, is protection of the environment and prevention of pollution.[2]

The conduct complained of in this case did not harm the environment, did not cause any pollution, and did not create threat of it. No substantive law was violated.

In broad terms, the convictions are based on three types of technical violations: (1) alteration of an underground pipe which was not connected to the hazardous waste disposal pit, was not required as part of the construction of the pit, was a mine drainage disposal pipe and by regulation could not be part of the groundwater monitoring system;[3] (2) pumping water from the top (of the pit, of which water no analysis was submitted) for the purpose of complying with the Permit;[4] and (3) accepting

---

[1] These are some charges brought under the Crimes Code which are based on or related to the cited laws.

[2] See 35 P.S. § 691.4 and 6018.102.

[3] DER Regulatioins, [sic] 25 Pa.Code § 75.264(n)(4) states the requirements for the groundwater monitoring system which consists of monitoring *wells* and provides for the construction of an alternate and innovative monitoring system only where site conditions preclude the installation of monitoring *wells*.

[4] See Commonwealth's Exhibit No. 1 (Trial 1), Solid Waste Disposal Facility Permit No. 300679, paragraph 6(h), page 7 (in part); "Leachate shall not be allowed to accumulate in the pit to a depth greater than two (2) feet." (Copy attached to this brief.)

wastes without having first received separate specific approval each time.[5]

Paragraph (2) of Section 312 of the Crimes Code makes dismissal hereunder contingent on findings that conduct "did not *actually* cause or threaten the harm or evil sought to be prevented by the law defining the offense" or was "too trivial to warrant the condemnation of conviction."

This was a fledgling industry in the subject years of the early 1980's. Previously, there were few restrictions on disposal of industrial wastes, which were routinely buried on industry-owned property or just tossed in a garbage dump. (R. 285).

Appellant, who had been in the trucking business, hauling mostly for industry, purchased and developed a 600 plus acre site, obtained a fly-ash disposal permit in 1979 and began that operation, then obtained amendment to his facility permit for demolition disposal in another area of the site and for the Phase I Industrial Waste Pit in a different area of the original site permit area and began to operate them. The Phase I pit was permitted for hazardous waste. (He also commenced construction of larger Phase II Industrial Waste Pit, which has never been allowed to be used.) Appellant coordinated the operation of transportation and disposal of the industrial wastes of such large waste generators as U.S. Steel Corporation.

---

[5] See SWMA, Section 501(c), 35 P.S. § 6018.501(c), (in part); "Not more than one such notification (to the department) shall be required to be filed with respect to the same substance." (Emphasis added.)

The nature of the conduct charged viewed with the attendant circumstances does not warrant condemnation of conviction.

How can the court determine this question in such a case? It seems that the first step should be a review of the nature of the conduct.

None of the charged conduct was criminal in nature. None is *malum in se*. None is even *malum prohibition*. Assuming for argument that they were violations, they were that only because they were done without specific permission or with permission obtained late.

None of the charged conduct directly violated a statute. It is rather a violation of a permit condition or an agency regulation.

First, Appellant caused an underground pipe to be altered. That is not charged as an offense itself, but seven counts in Trial One were developed by the prosecutor out of that act.

The upshot of the pipe alteration actually was prevention of possible pollution by stopping the mine drainage collected in the pipe from entering the "tributary."

Second, the pumping of water from the top of the pit was known to him and may have been done with Appellant's approval. For the purpose of this *de minimus* consideration, it is most important to know that Appellant's permit would be violated if the rainwater level on top of the pit were permitted to exceed two feet. A *crime* to remove the water, a *crime* to *not* remove the water.

More important to note is that there was water in the pit. Appellant's pit didn't leak. His pit was state-of-the-

art and was said by a DER official in trial to be the best waste pit in this region. In the early process, no good way of disposing of excess rainwater from the pit had been found.

Third, DER felt Appellant should have filed more Module 1's for approval of waste streams. In Trial Two, Counts 4-51, 54 and 55 concern this. See revised information for Trial Two (R.1561).

Counts 4 and 5 concerned non-hazardous waste being grease barrels from Ohio Barge Lines. The charge is disposal without a permit. That charge is wrong and a Module 1 was not even required since it was non-hazardous.

Counts 6-49 are 44 charged violations, one for each truck, from Conoco Coal Research Division coal waste, being mostly "coal fines." DER approved the Module 1 after the waste was deposited in Appellant's pit. The application was made only because Conoco's lawyer insisted out of caution. It was never necessary. It was residual waste only.

Counts 50 and 51 concerning roller grease from U.S. Steel (Edgar Thompson Works) suggest that Appellant should have a "permit." The court relied on its opinion on testimony re Module 1's. (See Opinion, p. 64). Appellant had a "permit." This was residual waste and no Module 1 was required.

Counts 54 and 55 charge Appellant with operating a residual waste facility in Rostraver Township. He wasn't required to have a permit since he wasn't the owner or operator of a facility there. This was actually in the nature

of a resource recovery project in that the owner Wayne Fedorka and Bill Fedorka were paying Appellant's drivers to deliver lime from U.S. Steel and sewage sludge from McKeesport Sewer Authority for use as fertilizer on a "sod" farm. (R.189).

Commonwealth witness Daniel Peterson, Operations Supervisor of the Pittsburgh Region of the Bureau of Solid Waste Management (DER), testified on cross-examination in Trial One:

> Q. " . . . and violations are something that occur on every waste site in Pennsylvania regardless of how careful you are; aren't they.
>
> A. There is usually some violations found. (R. 339)

The same witness had admitted that in the same years of 1980, 1981 and 1982, DER was permitting hazardous waste to be disposed of in garbage dumps:

> Q. All right. During that time, isn't it a fact that the state of the art was such – and I'm talking about 1980, 1981, and 1982, isn't it a fact that the state of the art was such that you didn't even require pits like Mr. Fiore's, but you permitted hazardous wastes to be disposed of in garbage dumps?
>
> A. The regulations specifically allow for a municipal landfill under interim status to accept hazardous waste.
>
> Q. Now, this specific situation, during this time period, there was a hazardous waste disposal site where you permitted the disposal on a garbage dump; is that correct?

> A. The facility had interim status, yes.
>
> Q. And the process by which that disposal was undertaken, it wasn't disposed of in a facility like Mr. Fiore's where you had a clay-lined pit, it was simply mixed with garbage and buried, is that correct?
>
> A. This was placed in with the garbage, covered, and there was also a leachate collection system. (R.285-286)

Appellant's permit to operate the solid waste disposal facility was suspended in Fall 1983. Indeed, the violations charged didn't warrant that, but certainly when viewed for criminal prosecution these matters should be found to be de minimus. If Appellant violated his permit as charged, the administrative action against the permit was the remedy, not a felony criminal prosecution based on technical violations.

Appellant submits that Paragraph (2) of Section 312 is fully applicable here. Paragraphs (1) and (3) are also fully satisfied here based on the above discussions.

The evidence, the nature of the charges and the attendant circumstances do require a conclusion in favor of dismissal under Section 312.

VII. THE TRIAL ONE EVIDENCE IS INSUFFICIENT ON ALL COUNTS RE THE ALTERED PIPE

All of the counts of Trial One arise from the alteration of a pipe on Appellant's solid waste disposal site. Ironically the alternation [sic] of the pipe is not charged as an offense.

Count 1 charges that Appellant operated his hazardous waste disposal facility without a permit for the facility after the pipe was altered.

Count 2 charges that Appellant discharged industrial wastes without a discharge permit after the pipe was altered.

Count 3 charges that Appellant operated without a permit for the facility after the pipe was latered [sic] because the pipe was then an "unpermitted pipe system" disposing of hazardous waste leachate.

Count 4 charges Appellant operated a residual waste disposal facility contrary to his permit for the facility after the pipe was altered in disposing of residual waste through an unpermitted pipe system.

Count 5 charges Appellant with perjury in testimony in court regarding the alteration of the pipe.

Count 6 charges Appellant with obstruction of justice by the alteration of the pipe.

Count 9 charges Appellant with conspiracy with an employee regarding the alteration of the pipe.

The facts relevant to all of these counts are as follows:

Appellant obtained a DER permit (Com. Exh. No. 2, Trial One, attached to this brief) for the operation of a solid waste disposal facility. That Permit (No. 300679 issued 3/24/80) allwed [sic] the disposal of industrial wastes within an area designated as Phase I Industrial Waste Pit. The definition of "Industria" waste includes hazardous, residual and municipal wastes. Appellant's

facility was a double-lined clay pit having monitoring wells in accord with agency regulations for the purpose of permitting the monitoring of underground water. In addition it had a 4" pitliner monitor perforated pipe surrounding the pit at its base to monitor pipe leaks, which emptied into a tank. In addition, Appellant had placed an underground mine drainage pipe to collect drainage from an outlying mine, carry it by and under the waste pit and empty into a small creek referred to as "tributary" to the Youghiogheny River. This pipe is referred to as the "810" pipe. It was not essential to construction, operation or monitoring of the pit. It was listed in the Permit by DER as a "monitoring point." There was also another underground pipe that relocated a small underground stream which actually became the "tributary." This pipe is referred to as the "711" pipe. The 711 and 810 pipes at a downgradient from the pit both emptied into an open manhole constructed by Appellant where their [sic] flows mixed and entered another pipe which a few feet away flowed into the "tributary." Appellant held NPDES permits under the Clean Streams Law for discharge from the facility to the tributary of the Youghiogheny River including from pipes 711 and 810. In Fall 1982 a DER employee claimed to notice "organic odors" in the area of the manhole. His samples of the outfall of pipe 810 in the manhole showed traces of contaminants in the "mine drainage," measured few "parts per billion." No contaminants appeared in the collection tank from the 4" pit liner monitor perforated pipe surrounding the base of the pit. No contaminants appeared in the groundwater monitoring system wells. Without taking samples from the mine, DER suggested

that, since the traces had some characteristics consistent with wastes disposed in Appellant's Phase I pit and the contingent temporary pit, one of the pits was leaking. Appellant was also advised that he would have to stop the flow of the 810 water. In early 1983, Appellant was required to sign a Consent Order and Agreement calling for drastic changes in Appellant's plan for development of the site including the completion of the Phase II pit. This action was required based on the traces at pipe 810. In Summer 1983, Appellant caused a concealed alteration to the 810 pipe desinged [sic] to control the flow of the mine drainage water out of the 810 pipe into the manhole. It caused the flow to be reduced through a 2" elbow which had a shut off valve which could be controlled by a long arm running up to the ground surface. Steps were taken to conceal the alteration including running a small concealed transfer pipe so some of the water from the 711 pipe would run out of the end of the 810 pipe. With an open valve the mine drainage water would flow out of the 810 pipe. With a closed valve, the 810 pipe water would not flow and only transfer water from 711 would flow out of the end of 810. The only evidence regarding activity of the valve was given by Tracy Opfar, a part-time employee of Appellant and sone [sic] of Teeter Opfar, deceased employee. Tracy Opfar testified that he saw his father move the rock covering a cap and insert a tool which he thought turned a valve and he heard a little more water running. (R. 630). There was testimony that Appellant was present during some of the time of the construction of the pipe alteration. There was no evidence regarding Appellant relative to the 810 pipe after the construction. In some proceeding which occurred before

the Commonwealth Court of Pennsylvania, Appellant apparently was questioned about the 810 pipe and gave responses which were judged false. The court read the questions and answers to the jury. The court declared a finding of materiality or a matter of law often revising a transcript which was not made part of the record. The record also does not contain evidence of the nature of the proceeding in Commonwealth Court.

Count One

Appellant Had a Permit

By considerable distortion of the language of the Solid Waste Management Act, the prosecution has brought this felony charge. Without charging violation of SWMA Section 401(a), this case is a misdemeanor case. To make it felonious, it had to be charged that Appellant did operate a hazardous waste disposal facility without *a permit for such disposal facility.* Count One suggests that some way upon the alteration of the pipe Appellant no longer had a permit for the disposal facility.

Jury Instruction

The court erred in instructing the jury in response to a jury question. (R. 1495-1497.) The jury obviously was confused by the issue of the permit. It asked "By law, does a permit violation automatically revocate or suspend that permit or must it be worded so in the permit?" This count should not have gone to the jury, but the court compounded the error by it [sic] instruction. The court

separated the question into two parts, answered negatively to both parts and then instructed that they could find that Appellant "so altered the monitoring system and so significantly departed from the terms of the permit that the operation of the hazardous waste facility thereafter was an unpermitted operation of a hazardous waste facility."

The court repeated this, "Secondly, was the violation or the alteration so substantial as part of the condition of the permit that the operation of the facility thereafter was an operation of a facility without a permit." Those are questions of fact for you to answer." (R. 1497.)

Appellant respectfully refers this Count to Section [sic] of this brief where the matter of the SWMA permit is discussed.

Further, Appellant submits that there is no precedent in American jurisprudence for such an instruction and the verdict returned upon it.

If one has a permit or license to do something, one may violate it and thus prompt suspension or revocation by the governing or regulatory authority.

Under the court's instruction here, if a person having a driver's license drove 80 mph in a 55 mph zone, upon pulling him over, a policeman could given [sic] him one citation for speeding and another for driving while his license were suspended or revoked, stating that a finder of fact will decide whether the violation was such as to cause an automatic suspension or revocation of the license.

The court told the jury that a permit violation does not automatically revoke or suspend the permit but then told the jury it could find that it did.

The alteration of the pipe at most was an action contrary to the facility permit as a violation of SWMA Section 302(a) and punishable as a summary offense or misdemeanor under Section 606(a) or (b).

Monitoring Pipes

Further, the allegation that there was "alteration * * * of its approved monitoring pipes" is incorrect under the regulations and the facts.

The applicable regulations establish the groundwater monitoring system for a hazardous waste disposal site at 25 Pa.Code § 75.264(n)(4).

The regulation states that the groundwater monitoring system *shall consist of monitoring wells,* at least one upgradient and those downgradient.

The regulations do not provide for "monitoring pipes" or "monitoring points."

The permit (page 6) Paragraph 6(c) stated a condition regarding the monitoring wells and then stated, "In addition to the wells listed above, the outfalls of the groundwater underdrain pipe and the 4" lines monitoring pipe are to be established as monitoring points." There was no evidence of official action taken to establish those.

The alteration of the pipe doesn't appear itself to be a violation of law, regulation or permit condition.

The charge and the verdict on Count One are contrary to law and evidence and must be reversed and dismissed.

Count Two

This charges that industrial wastes were discharged without a discharge permit and alleges that the discharge was leachate from the disposal facility.

The evidence is that Appellant always held NPDES discharge permits under the Clean Streams Law in addition to the SWMA Permit to operate the facility.

Solid Waste Permit No. 300679 applies to a whole facility as defined at 25 Pa.Code 75.260. A facility is all land, structures, and other appurtenances or improvements on a property where hazardous waste is treated, stored or disposed. Permit No. 300679 applied to 120 acres of the site including the area where the pipes were located. Further, the only permits issued under the Clean Streams Law are NPDES permits. Appellant retained NPDES permits No. 0046663 for pipe 810 and No. 00466655 for the same pipe. These permits applied continuously from 1979 to the present. The piping system and discharges were permitted under these three permits.

Appellant held a permit to discharge through pipe 810 which was a drainage pip [sic] from an outlying mine. That pipe was not connected to the disposal pipe, was not built as a pit monitoring pipe and was intended to run the mine drainage past the facility.

There was no evidence that the "traces" in the 810 pipe didn't come from the mine or some other source flowing into the mine.

Also there was no evidence regarding the pit liner monitoring pipe or the established monitoring wells regarding anything leaving Appellant's pit.

The Commonwealth had the burden of proof that Appellant (1) willfully and negligently (2) discharged leachage through (3) and unpermitted piping system.

There is no evidence of any of those elements.

If Appellant discharged anything through the 810 pipe it would have been under his NPDES permit. His alleged act was blocking the flow through 810.

There was no leachate. It must be proven to have come from the pit to fit that definition. There was no such proof. The evidence was to the contrary.

Appellant didn't discharge anything into a "water of the Commonwealth" since the water *in the mine* was already "water of the Commonwealth" which was merely redirected by a pipe for a distance. There was no evidence Appellant discharged anything into it.

Count Three

Again this is a felony charge under Section 401(a) for doing an act without a *permit for the disposal facility.* In addition, it charges discharge of leachate as under count two.

Count Four

This charge of discharge of residual wastes through pipe 810 without proof as if from the disposal pit.

This count would consider the existence of the facility permit and charge a violation of it as a misdemeanor by a discharge from the pit which is not supported by the evidence.

Count Five

This is the perjury count. The court declared "materiality" as a matter of law based on its revision of the transcript which was not made a matter of record. A review of that element cannot be made and the record thus does not contain evidence to support that finding.

The nature of the proceedings was not established in evidence. (The transcript regarding this count is found in the Supplemental Record.)

Count Six

Count six is the Obstruction of Justice alleging physical interference with a governmental function by altering the piping system. This crime specifically excludes the failure to perform a legal duty other than an official duty or any other means of avoiding compliance with law without affirmative interference with governmental functions. 18 Pa.C.S.A. 5101. The case law indicates that this offense has only been found when direct contact was made with an enforcement officer in his official duty or force was used. *Com. v. Saxon,* 275 A.2d 876 (Pa.Super. 1971).

The case law supports that direct physical force must be used upon the enforcement officer. In *Com. v. Farling,* 12 Dist. 732 (Dauph. 1903) the closing and hooking of a screen door was not an obstruction and to have that effect there must be a use of force, threats or power.

Mr. Shack, a DER enforcement officer, in testifying for the Commonwealth, stated that Appellant never argued with him, never chastised him, never raised his voice and never gave him a hard time. (R. 374). As a matter of fact, he stated about Appellant that "He met the approved design standards. He did what he was supposed to do, you kno, [sic] if he would have done it in the first place, there wouldn't have been any problem." The evidence indicates that Appellant never used force, threats or power and therefore this count must fail.

Count Nine

Count nine alleges a conspiracy with an employee to facilitate illegal disposal of hazardous wastes. No hazardous wastes were disposed of in violation of the SWMA or the CSL since the facility was properly permitted.

Since the activity was not illegal, the conspiracy count must fail.

* * *

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	NO. 00485 Pittsburgh, 1988
WILLIAM FIORE, Appellant	:	

Appeal From Judgment of Sentence April 10, 1987 In Court of Common Pleas, Criminal Division, Allegheny County, at No. CC8508740

BEFORE: CAVANAUGH, DEL SOLE and MONTGOMERY, JJ.

MEMORANDUM: FILED: May 12, 1989

The appellant, William Fiore, was the owner and operator of a waste disposal facility known as the Municipal and Industrial Disposal Company, located in Elizabeth Township, Allegheny County. In 1979, the company received a permit from the Commonwealth of Pennsylvania to dispose of various wastes, including hazardous wastes.

As a result of alleged unlawful disposal of waste, a multi-count indictment was presented against the appellant, charging over 150 violations of the Solid Waste Management Act[1] and related statutes. A co-defendant, David Scarpone, was also charged with some, but not all, of the offenses alleged against the appellant. As a result, a jury trial was held involving only charges which included the co-defendant and a separate non-jury trial was held

[1] The Solid Waste Management Act is found at 35 Pa.C.S. § 6018.101 et seq.

on the remaining charges which involved only the appellant. Both trials were held before Novak, J.

At the jury trial the appellant was convicted of disposing of hazardous wastes and operating a hazardous waste facility without a permit, discharging industrial wastes without a permit, disposing of residual wastes and operating a residual waste facility contrary to his permit, perjury, obstruction of the administration of the law, and criminal conspiracy.

The appellant was found guilty at the non-jury trial of similar offenses.[2] The appellant's post-trial motions were denied and he was sentenced to a total period of confinement of six to twelve years, concurrent probation for twenty-five years, and fines totalling $200,000.00. His petition to modify the sentence was denied and he has appealed to this court from the judgment of sentence.

The appellant has raised twenty-two issues on appeal, all of which were covered in the comprehensive and analytic opinion of Novak, J. of the court below.[3] We

[2] The trials in the court below were lengthy and the Notes of Testimony exceeded 2,200 pages.

[3] The twenty-two issues raised in the Statement of Questions Involved covered three pages and were over 70 lines in length. Pa.R.A.P. provides:

> Rule 2116. Statement of Questions Involved.
>
> (a) General rule. The statement of the questions involved must state the question or questions in the briefest and most general terms, without names, dates, amounts or particulars of any kind. It should not ordinarily exceed 15 lines, must never exceed one page, and must always be on a separate page, without

affirm on the basis of the opinion of the court below. However, we would add our thoughts with respect to the challenge to the sentence on the grounds that it is excessive. *Commonwealth v. Tuladziecki*, 513 Pa. 508, 522 A.2d 17 (1987) permits an appeal from the discretionary aspect of a sentence only where the appellant includes in his brief, immediately preceding argument in support of the challenge, a separate concise statement of the reasons for allowance of appeal under 42 Pa.C.S. § 2119(f), and appellant has not complied with this requirement. Nevertheless, we concluded in *Commonwealth v. Krum*, 367 Pa. Super. 511, 533 A.2d 134 (1987) that the requirement of Pa.R.A.P. 2119(f) is procedural only and is waived if not raised by the Commonwealth. *See also, Commonwealth v. Losch*, 369 Pa. Super. 192, 535 A.2d 115 (1987); *Commonwealth v. Smith*, 375 Pa. Super. 419, 544 A.2d 991 (1988). However, the commonwealth has objected to the appellant's failure to comply with Rule 2119(f), and its objection is appropriate. Accordingly, we must quash the appeal as it pertains to the excessiveness of sentence.[4]

---

any other matter appearing thereon. This rule is to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not set forth in the statement of questions involved or suggested thereby.

While we granted the appellant permission to file a brief not to exceed 130 pages, serious effort must be made to comply with the Rules of Appellate Procedure concerning the contents of briefs.

[4] Even if the Commonwealth had not objected to the appellant's failure to comply with 42 Pa.C.S. § 2119(f), under 42 Pa.C.S. § 9781(c) an allowance of appeal may be granted at the discretion of the appellate court only where it appears that there

Appeal quashed as to excessiveness of sentence and judgment of sentence affirmed.

Opinion by Novak, J. of Allegheny County Court of Common Pleas attached. (January 19, 1988)

Del Sole, J. files Concurring Memorandum.

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	:	NO. 00485 Pittsburgh, 1988
WILLIAM FIORE, Appellant	:	

Appeal From Judgment of Sentence April 10, 1987 In Court of Common Pleas, Criminal Division, Allegheny County, at No. CC8508740

BEFORE: CAVANAUGH, DEL SOLE and MONTGOMERY, JJ.

---

is a substantial question that the sentence imposed is not appropriate. In exercising that discretion the court may consider the trial court's opinion and the record. *Commonwealth v. Darden*, 366 Pa. Super. 597, 531 A.2d 1144 (1997); *Commonwealth v. Felix*, 372 Pa. Super. 145, 539 A.2d 371 (1988). Considering the gravity and great number of offenses committed, and the potential impact on the environment, we would find no substantial question as to the appropriateness of the sentence, even if we were to reach that issue.

CONCURRING MEMORANDUM BY DEL SOLE, J.:

I concur in the result reached by the Majority but would affirm the Judgment of Sentence. I disagree with the Majority's decision to disallow an appeal from the discretionary aspects of sentencing.

At the outset I believe the time has come for the General Assembly to review 42 Pa. C.S.A. § 9781(b) which limits the review of discretionary sentencing matters to those cases where only a "substantial question" exists and where this court agrees to exercise its discretion and hear the issue. It is my view that in a criminal proceeding a defendant has a right to have all matters reviewed which have been properly preserved at the trial court level. Further, I believe that Article 5, Section 9 of the Constitution of this Commonwealth prohibits the limitation of review found in 42 Pa. C.S.A. § 9781(b). That Article provides as follows:

> There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

In my view this section establishes a right of appeal from a court of record to an appellate court. The applicable section of the sentencing code that eliminates a *right* of appeal by requiring that review of certain sentencing questions is purely discretionary with the appellate court would seem to violate this constitutional provision. This

question can only be addressed in the appellate courts and is not an issue that can be raised in the trial court.

With regard to to [sic] the case sub judice, having reviewed the sentence and the reasons for the sentence stated by the sentencing judge, I do not believe that the trial judge abused his discretion in imposing the sentence. I believe that the sentence imposed by the trial judge was appropriate and proper under the circumstances and would, therefore, affirm the judgment of sentence.

Dave SCARPONE, Appellant,

v.

COMMONWEALTH of Pennsylvania, Appellee.

Commonwealth Court of Pennsylvania.

Argued Oct. 4, 1990.

Decided Aug. 5, 1991.
Petition for Allowance of Appeal
Granted Nov. 7, 1991.

Robert J. Amelio, for appellant.

George Jugovic, Jr., Sp. Deputy Atty. Gen., for appellee.

Before McGINLEY and KELLEY, JJ., and BARRY, Senior Judge.

KELLEY, Judge.

David Scarpone, appellant, was employed as general manager of the Municipal and Industrial Disposal Company (MIDC). MIDC is owned by William Fiore and consists of a fly-ash disposal facility and a demolition waste disposal site in Elizabeth Township, Allegheny County. In 1979, Fiore decided to construct a lined pit for the placement of industrially generated wastes on the same site adjacent to the fly-ash disposal facility. The Department of Environmental Resources (DER) granted a permit to construct the pit. The permit required individual deposits of waste into the pit (waste streams) to be approved by DER. The pit contained an underground monitoring pipe that provided DER inspectors the ability to monitor the outfall of the pipe to determine if hazardous waste was leaking, causing pollution of the environment.

In 1982 and 1983, inspectors began to detect hazardous waste from the monitoring pipe and DER informed Fiore that no deposit approvals (Module 1 approvals) would be issued until the condition was resolved. In July of 1983, Scarpone directed other employees to surreptitiously alter the monitoring system by excavating the area around the outfall of the monitoring pipe and altering its flow. The intake of the original monitoring pipe was capped and a smaller pipe was installed to bring a trickle of uncontaminated water into the monitoring pipe.

DER inspectors discovered this alteration and criminal charges were filed against Scarpone and Fiore in the Court of Common Pleas of Allegheny County. Upon a jury trial, Scarpone was convicted of causing and assisting in the operation of a hazardous waste disposal facility without a permit in violation of the Solid Waste Management Act (SWMA),[1] obstructing the administration of law or other governmental function,[2] and conspiracy.[3] This appeal followed.[4]

Scarpone's first argument is that it was error for him to be charged in Count 1 of the criminal information with

---

[1] Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§ 6018.101-6018.1003.

[2] 18 Pa.C.S. § 5101.

[3] 18 Pa.C.S. § 903.

[4] Scarpone originally appealed to the Superior Court. The appeal was transferred sua sponte to this Court which has jurisdiction of the SWMA conviction pursuant to 42 Pa.C.S. § 762(a)(2)(ii). We may exercise jurisdiction over the related convictions under *Commonwealth v. Tyson*, 57 Pa.Commonwealth Ct. 569, 427 A.2d 283 (1981).

operating a waste disposal facility without a permit when Fiore possessed a permit for the facility. Scarpone argues that the only way he could be convicted of this offense is if the permit had been revoked. Count 1 reads as follows:

> The defendant Dave Scarpone did cause and assist in violations of the Solid Waste Management Act, to wit, the defendant caused and assisted in the alteration of monitoring pipes at a hazardous waste disposal facility in Elizabeth Township, Allegheny County operated without a permit from the Pennsylvania Department of Environmental Resources ('DER') for such alterations from 1983 until 1985, in violation of 35 P.S. § 6018.401(a), which assistance violates 35 P.S. § 6018.610(9) and is a felony of the second degree pursuant to 35 P.S. § 6018.606(f).

The Commonwealth argues that the modifications of the monitoring pipe created a facility not authorized by the permit. In other words, the Commonwealth's argument is that Fiore was acting beyond the scope of the permit and this justifies the charge of operating without a permit.

In wording Count 1, the Commonwealth relied on §§ 401(a), 606(f), and 610(9) of the SWMA. These sections read, respectively:

> No person or municipality shall store, transport, treat, or dispose of hazardous waste within this Commonwealth unless such storage, transportation, treatment, or disposal is authorized by the rules and regulations of the department; no person or municipality shall own or operate a hazardous waste storage, treatment or disposal facility unless such person or municipality has first obtained a permit for the storage, treatment

> and disposal of hazardous waste from the department; and, no person or municipality shall transport hazardous waste within the Commonwealth unless such person or municipality has first obtained a license for the transportation of hazardous waste from the department.

35 P.S. § 6018.401(a).

> Any person who stores, transports, treats, or disposes of hazardous waste within the Commonwealth in violation of section 401, or in violation of any order of the department shall be guilty of a felony of the second degree and, upon conviction, shall be sentenced to pay a fine of not less than $2500 but not more than $100,000 per day for each violation or to imprisonment for not less than two years but not more than ten years, or both.

35 P.S. § 6018.606(f).

> It shall be unlawful for any person or municipality to:
>
> . . . .
>
> (9) Cause or assist in the violation of any provision of this act, any rule or regulation of the department, any order of the department or any term or condition of any permit.

35 P.S. § 6018.610. If the alteration of the monitoring pipe can be said to result in the operation of a hazardous waste facility without a permit under § 401(a), then Scarpone may be charged as an accomplice under § 610(9) to a second degree felony under § 606(f).

The Commonwealth cites two cases from this Court in support of its interpretation of these sections. In *Department of Environmental Resources v. Fleetwood Borough Authority*, 21 Pa.Commonwealth Ct. 349, 346 A.2d 867 (1975), this Court upheld a criminal conviction for violating The Clean Streams Law (Law)[5] where the borough authority had a sewer permit but discharged improperly treated water. Section 202 of the Law[6] declares that no person or municipality shall discharge sewage into the waters of the Commonwealth without first obtaining a permit. We concluded that the authority had no permit to discharge sewage which had not been satisfactorily treated.

In *Trevorton Anthracite Company v. Department of Environmental Resources*, 42 Pa.Commonwealth Ct. 84, 400 A.2d 240 (1979), this Court upheld civil penalties for the alteration of a waste treatment facility. Trevorton Anthracite Company had a permit to construct a large settling lagoon for the purpose of allowing suspended solids to settle out of the water before the water was discharged into a stream. In accordance with the permit, three weir boxes, with openings two inches below the surface of the water, were placed along the berm of the lagoon to allow the water to discharge. When two of the boxes became clogged, Trevorton replaced them with an overflow pipe which had an intake point a foot below the surface of the water. This Court upheld a conclusion that

---

[5] Act of June 22, 1937, P.L.1987, as amended, 35 P.S. §§ 691.1-691.1001.

[6] 35 P.S. § 691.202.

the company had violated § 308 of the Law[7] which makes it unlawful to construct or erect treatment works without a permit.

Both *Fleetwood Borough* and *Trevorton Anthracite* were decided under The Clean Streams Law and not the SWMA. In *Fleetwood Borough*, the criminal sanction was authorized by § 602 of the Law[8] which, at the time the case was decided, did not specifically provide a criminal penalty for violating the conditions of a permit. Section 602 did not set out criminal sanctions for specific violations of the Law, but merely provided penalties for any person who "violates any provision of this act or any rule or regulation or order of the board or any order of the department. . . . " *Fleetwood Borough*, 21 Pa.Commonwealth Ct. at 352, 346 A.2d at 869. Similarly, in *Trevorton Anthracite* the civil penalties were authorized by § 605 of the Law[9] which, again, did not address specific violations but merely referred to a violation of the Law, a rule or regulation of the department, or an order of the department.

In contrast to the general nature of the penalty provisions in The Clean Streams Law when the General Assembly enacted the Solid Waste Management Act, it saw fit to give a more structured format to the penalty provisions. In § 606 of the SWMA, in addition to general criminal sanctions similar to those in The Clean Streams Law, § 606(d) establishes a third degree misdemeanor for

---

[7] 35 P.S. § 691.308.

[8] 35 P.S. § 691.602.

[9] 35 P.S. § 691.605.

the transportation of any hazardous waste to a facility which does not possess a permit to accept such waste; for the falsification of documents prepared for purposes of compliance with the act; and for the municipal storage of hazardous waste without a permit. Section 606(f) under which Scarpone was convicted establishes a second degree felony for violations of § 401 or any DER order. Section 401 requires that any person operating a hazardous waste facility obtain a permit.

Section 606(g) of the SWMA establishes a first degree felony for "[a]ny person who intentionally, knowingly or recklessly stores, transports, treats, or disposes of hazardous waste within the Commonwealth in violation of any provision of this act, and whose acts or omissions cause pollution, a public nuisance or bodily injury to any person. . . ." Section 601[10] provides that a violation of "any term or condition of any permit, shall constitute a public nuisance." Thus the SWMA has a specific provision providing a penalty for a violation of the conditions of a permit, something which the relevant statutory sections in *Fleetwood Borough* and *Trevorton Anthracite* lacked.[11]

There is no question that Scarpone's activities were reprehensible and deserving of punishment. The Commonwealth is constrained, however, to follow the legislature's dictates in pursuing criminal charges for this sort of conduct. We cannot help but conclude that the Commonwealth's interpretation of § 606(f) is strained at best.

---

[10] 35 P.S. § 6018.601.

[11] Sections 602 and 605 of The Clean Streams Law were later amended to add language concerning the violation of the conditions of a permit.

DER issued a valid permit for the waste disposal facility. The alteration of the monitoring pipe was clearly a violation of the conditions of the permit. But to say that the alteration resulted in the operation of a new facility which had not been permitted is to engage in a semantic exercise which we cannot accept. As a penal provision of a statute, § 606(f) must be strictly construed, 1 Pa.C.S. § 1928(b)(1), and we will not let its language be stretched to include activities which clearly fall in some other subsection. That is the case here where § 606(g) plainly establishes a first degree felony for violating the conditions of a permit. Accordingly, we must reverse the conviction of causing and assisting in the operation of a hazardous waste facility without a permit.[12]

Scarpone was also charged with obstructing a governmment function under 18 Pa.C.S. § 5101, which reads:

> A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

---

[12] Because of our disposition of this issue, we need not address Scarpone's arguments that Count 1 failed to provide notice of the issues for trial and the charges to be defended, and that the Commonwealth was required to prove the culpable commission of the crime in order to obtain a felony conviction.

Scarpone argues that he could not be convicted of this crime because there was no "affirmative interference with governmental functions". He seems to be arguing that there must be some sort of physical interference with the DER inspectors as they perform their duties in order for a violation under this section to occur. Scarpone cites no cases which support this theory, and we are satisfied that capping a monitoring pipe and diverting uncontaminated water into the pipe is affirmative interference with a governmental function and "physical interference or obstacle" which obstructs the administration of law. His conviction on this charge will therefore be affirmed.

Scarpone was charged in Count 6 (originally Count 9) with criminal conspiracy. Count 6 reads as follows:

> The defendant Dave Scarpone did, with the intent of promoting and facilitating its commission, agree with William Fiore and other persons known and unknown to engage in conduct prohibited by the Solid Waste Management Act of 1980 and the Crimes Code and did perform or cause to be performed overt acts in pursuit of this conspiracy, to wit, the defendant, with the intent to promote and facilitate illegal discharges and disposal of industrial, residual and hazardous wastes, agree with William Fiore and other persons known and unknown to engage personally and through the conduct of employees acting under his control and supervision in such activity and did perform numerous overt acts, including but not limited to the illegal disposal of residual and hazardous wastes and the alteration of piping systems under a hazardous waste facility in Elizabeth Township, Allegheny County, in violation of 18 Pa.C.S. § 903.

Scarpone argues that the count is invalid because it does not mention the specific section of the SWMA or a specific crime which was the subject of the conspiracy. He makes a similar argument with respect to the trial judge's charge to the jury.

Because of our reversal of the conviction under Count 1, we must also reverse the conspiracy conviction. Scarpone could not be convicted of conspiracy to violate § 606(f) because the conduct which was allegedly the object of the conspiracy was not a crime under § 606(f). The Commonwealth neither charged nor attempted to prove conspiracy to commit a violation of § 606(g).

The trial judge explained in his opinion that instead of imposing consecutive sentences for each count, he chose to impose a single sentence for the Count 1 conviction, and no further sentence for the convictions on Counts 3 and 6. Under such circumstances, where the sentence for one count may have been influenced by the sentence imposed for a second count which is subsequently reversed, a remand is appropriate for resentencing. *Commonwealth v. Santiago*, 489 Pa. 527, 414 A.2d 1016 (1980) (where trial court imposed single consolidated sentence for three counts and one of the convictions was reversed, case was remanded for resentencing on remaining counts); *Commonwealth v. Padden*, 335 Pa.Superior Ct. 51, 483 A.2d 950 (1984) (remand for resentencing where the court could not say whether the trial court would have imposed the same sentences for two aggravated assault convictions if it had known that a third conviction

would be invalidated); *Commonwealth v. Grassmyer*, 237 Pa.Superior Ct. 394, 352 A.2d 178 (1975) (where trial court merged indecent assault conviction into statutory rape conviction when sentencing defendant and statutory rape conviction was reversed, case was remanded for resentencing on indecent assault conviction); *Commonwealth v. Lockhart*, 223 Pa.Superior Ct. 60, 296 A.2d 883 (1972) (invalidation of conviction on one count which may have influenced the sentence on remaining counts resulted in remand for resentencing).

In summary, we reverse the trial court's judgment of sentence as to the convictions of operating a hazardous waste facility without a permit (Count 1) and conspiracy (Count 6), and affirm as to the conviction of obstructing the administration of law or other governmental function (Count 3). We remand for resentencing.

ORDER

NOW, this 5th day of August, 1991, the order of the Court of Common Pleas of Allegheny County, CC No. 8508741, dated April 10, 1987, is reversed with respect to the convictions of operating a hazardous waste facility without a permit (Count 1) and conspiracy (Count 6), and affirmed with respect to the conviction of obstructing the administration of law or other governmental function (Count 3). We remand for resentencing.

Jurisdiction relinquished.

COMMONWEALTH of Pennsylvania, Appellant at No. 104 W.D. Appeal Docket 1991.

v.

Dave SCARPONE, Appellant at No. 103 W.D. Appeal Docket 1991.

Supreme Court of Pennsylvania.
Argued Sept. 24, 1992.
Decided Dec. 15, 1993.

Robert J. Amelio, Pittsburgh, for Dave Scarpone.

Ernest D. Preate, Jr., Atty. Gen., Anthony Sarcione, Executive Deputy Atty. Gen., Robert A. Graci, Chief Deputy Atty. Gen., Andrea F. McKenna, Deputy Atty. Gen., Harrisburg, for Com.

Before NIX, C.J., FLAHERTY, ZAPPALA, PAPADAKOS and CAPPY, JJ.

OPINION OF THE COURT

PAPADAKOS, Justice.

Two issues are presented for our consideration in this appeal by Dave Scarpone and the Commonwealth. These issues involve the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. § 6018.101 et seq., specifically §§ 6018.606(f) and 6018.401, and the Crimes Code, Act of Dec. 6, 1972, P.L. 1482, No. 334, eff. June 6, 1973, as amended, 18 Pa.C.S. § 101 et seq., specifically § 5101.

Scarpone appeals from the affirmance of his conviction of obstructing the administration of law and other

governmental function (18 Pa.C.S. § 5101) and the Commonwealth cross-appeals from the reversal of Scarpone's conviction of causing and assisting in the operation of a hazardous waste disposal facility without a permit (35 P.S. §§ 6018.606(f) and 6018.401) 141 Pa.Commonwealth 560, 596 A.2d 892.

Dave Scarpone was the general manager of the Municipal and Industrial Disposal Company (MIDC) which is located in Elizabeth Township, Allegheny County. It operated a fly-ash disposal facility and a demolition waste disposal site. In 1979, the facility received a permit to dispose of various wastes including hazardous wastes. MIDC is owned by Scarpone's co-defendant at trial, William Fiore.

For each type of waste or "waste stream" which the company intended to receive at this site, it was required to submit a form or "module" to the Department of Environmental Resources (DER) for approval. The form known as "Module 1" indicates the type of waste, how it is generated, its chemical and physical characteristics, where it will be placed and how it will be disposed. The information is certified by an engineer employed by the landfill operator. DER then reviews the proposal to determine whether the particular waste stream is compatible with: 1) other waste deposited on that site, and 2) the site liner. Upon receipt of a module, DER's technical staff reviews it. DER will then either approve or reject the module. If rejected, the landfill operator may not deposit this particular waste at his facility.

MIDC's disposal facility contained, inter alia, a Phase I disposal pit, a temporary disposal pit, and a demolition

site. The facility was licensed to receive certain streams of hazardous waste and deposit them in the temporary pit and later the Phase I pit. The Phase I pit was lined with natural clay which had been found to be sufficient to contain the wastes and keep them from seeping out. After the Phase I pit was full, it was eventually to be closed and covered in order to return the site to its natural condition. In order to be sure that the hazardous wastes were not seeping into the environment, various monitoring systems were established.

Running under the Phase I pit was an under-drain which was identified as pipe 810. This under-drain converges with the 711 pipe in a manhole near the pit and emits a single discharge. The purpose of the under-drain was to convey mine water beneath the disposal pit carrying it away from the liner. If the liner failed, materials seeping out of the pit through the liner would appear in the under-drain.

In late 1982 and early to mid 1983, a DER Solid Waste Supervisor, Mr. Dan Peterson, during routine inspection visits, detected a strong organic odor coming from the manhole. He described this odor as very similar to the type of odor that one gets when one is around a disposal pit. Also, it was considered similar to odors one gets at a U.S. Steel coke-making facility. Numerous samples of the discharge from the 711 and 810 pipes were collected by the DER and tested at their laboratory in Harrisburg. The samples tested positive for the presence of organic chemicals (i.e., Benzene, Toluene and Xylene).

DER officials informed Mr. Fiore that no additional requests to dispose of hazardous wastes would be

approved until the matter was resolved. Subsequently, several meetings were held between MIDC and DER officials. As a result of these discussions, MIDC and the Commonwealth entered into a "Consent Order and Agreement." The agreement provided that MIDC would apply for a water quality permit (NPDES) which would set certain limits on the chemicals discharged from the site. If the discharge exceeded those limits, MIDC agreed either to establish a treatment plant on the site or collect the discharge and transport it to a treatment plant.

Subsequently, in November of 1983, James R. Shack, a solid waste specialist for the DER, who took samples from both the 810 pipe and the 711 pipe, noticed that the discharge flow from the 810 pipe had lessened significantly and the odors no longer existed. On July 26, 1984, Mr. Shack observed that there was no discharge flow coming from the 810 pipe. Since he was curious about this phenomenon, Mr. Shack climbed down into the manhole and then maneuvered himself up into the 810 pipe. When he did so, he discovered that the 810 pipe had been capped with three or four metal plates.

Charles Kroll, a welder, testified that he was contacted and hired by Mr. Scarpone during the summer of 1983 to cap the 810 pipe, install an elbow pipe and another smaller pipe which led to a disposal pit which was not yet in use. Mr. Kroll also indicated that Mr. Scarpone directed this capping activity. Another welder, Elmer Holmes, testified that during the same time period, he was hired and directed by Mr. Scarpone to install a two-inch pipe below ground between two larger pipes. Stemming from the two-inch pipe was a stand pipe which stood perpendicular to it and reached the surface of the

ground. Inside this stand pipe and attached to the two-inch pipe was a valve which, with the aid of a socket-type wrench, could be turned on and off.

The capping of the 810 pipe prevented the flow of water from under the Phase I pit into the 810-711 monitoring point. This was the discharge which previously had given off organic odors leading to the finding that hazardous wastes were seeping into the aquifer running under the pit. The newly installed connecting pipe brought water from the unopened disposal pit to a point in front of the cap. Had this alteration not been made, the capping of the 810 pipe would have prevented any flow at all at the monitoring point. A third alteration consisted of a hidden pipe operated by a buried valve covered over with rocks. When the valve was opened, this pipe permitted the drainage which had backed up behind the cap of the 810 pipe to flow through the monitoring point and on into an unnamed tributary of the Youghiogheny River. Employees of MIDC testified that they observed Mr. Scarpone, and others, open this valve at night and on weekends when DER officials were not likely to appear to check the monitoring point.

Although Mr. Scarpone and Mr. Fiore were not charged with polluting the waterways, the Commonwealth's evidence established that when the valve was turned on, a discharge flowed from the outfall pipe into the tributary. Samples of this discharge were collected in small stainless steel buckets. These samples were transmitted to the DER laboratory in Harrisburg where they were analyzed by DER chemists. The samples all contained hazardous wastes. Two former MIDC employees testified that on various occasions they were present

when Mr. Scarpone personally opened the valve or ordered other persons to open the valve.

When DER discovered the alterations, it filed criminal charges against both Fiore and Scarpone in the Court of Common Pleas of Allegheny County. After a jury trial, Mr. Scarpone was found guilty of violating the SWMA by causing and assisting in the operation of a hazardous waste disposal facility without a permit (35 P.S. §§ 6018.606(f) and 6018.401); obstructing the administration of law and other governmental function (18 Pa.C.S. § 5101); and criminal conspiracy (18 Pa.C.S. § 903). Post-trial motions were timely filed and denied.

Mr. Scarpone was sentenced to pay a fine of $5,000.00 and to serve a period of incarceration of not less than 11 1/2 months nor more than 23 months. A motion to reconsider was denied and appeal to the Commonwealth Court followed. The Commonwealth Court reversed Scarpone's conviction of causing and assisting in the operation of a hazardous waste facility without a permit, and affirmed the obstruction (6018.606(f) and 6018.401) and conspiracy (18 Pa.C.S. § 903) convictions. The Commonwealth challenges the reversal of the permit conviction and Scarpone challenges the affirmance only of the obstruction charge. We granted review in this case because of a conflict between the intermediate appellate courts in deciding the permit issue. Scarpone and his co-defendant Fiore were both charged with and found guilty of operating without a permit.

Scarpone took his appeal to the Commonwealth Court and that court found it impossible to conclude that the alteration of the pipe resulted in the operation of a

new facility for which no permit had been issued. Although the facility may have acted in breach of the permit it held, the court would not hold that this was tantamount to acting without any permit.

Fiore took his appeal to the Superior Court and raised the issue by way of a sufficiency of the evidence argument. The Superior Court found the evidence sufficient and issued an unpublished memorandum opinion upholding his conviction of operating a hazardous waste facility without a permit. The two courts are clearly in conflict and this leaves the Attorney General's office ill-advised on how it should proceed in such situations.

We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit against Mr. Scarpone under the statute. Simply put, Mr. Scarpone did have a permit. A more appropriate charge may have been brought under alternative provisions of the statute, viz, 35 P.S. §§ 6018.606(g) and 6018.601.

Section 35 P.S. § 6018.606(g) of the SWMA makes it a first degree felony for "[a]ny person who intentionally, knowingly or recklessly stores, transports, treats, or disposes of hazardous waste within the Commonwealth in violation of any provision of this act, and whose acts or omissions cause pollution, a public nuisance or bodily injury to any person . . . ". 35 P.S. § 6018.601(a) provides that a violation of "any term or condition of any permit, shall constitute a public nuisance." Hence, the SWMA has specific provisions providing a penalty for violations of the conditions of a permit. Under such circumstances, the Commonwealth must adhere to the legislative scheme in

pursuing criminal charges. The alteration of the monitoring pipe here was execrable and constituted a clear violation of the conditions of the permit. But to conclude that the alteration constituted the operation of a new facility without a permit is a bald fiction we cannot endorse. Penal provisions of a statute must be strictly construed under 1 Pa.C.S. § 1928(b)(1).

We agree with the Commonwealth Court that the statutory language here cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection. The Commonwealth Court was right in reversing Mr. Scarpone's conviction of operating without a permit when the facility clearly had one.

Mr. Scarpone was also charged with and convicted of obstructing a government function under 18 Pa.C.S. § 5101.

That statute reads:

> A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

Mr. Scarpone argued to the Commonwealth Court that he could not be convicted of this crime because there

was no "affirmative interference with governmental functions." He appeared to argue that there must be some sort of actual physical interference with the DER inspectors as they perform their duties in order for a violation under this section to occur. In his direct appeal to us, Mr. Scarpone has cited no persuasive authority which supports this theory and, like the Commonwealth Court, we are satisfied that what took place here was affirmative interference with a governmental function. Mr. Scarpone's conviction on this charge must be affirmed.

For the reasons set forth above, the Commonwealth Court's setting aside of Mr. Scarpone's conviction of operating a hazardous waste facility without a permit is affirmed. Mr. Scarpone's conviction of obstructing the administration of law or other governmental function is affirmed.

LARSEN, J., did not participate in the consideration or decision of this case.

ZAPPALA, J., concurs in the result.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

WILLIAM FIORE

CRIMINAL DIVISION

CC No. 8508740

MOTION FOR POST-CONVICTION COLLATERAL RELIEF

Filed on behalf of:
DEFENDANT

Counsel of record for this party:

HAROLD GONDELMAN, ESQ.
Pa. Id. #00614

38th Floor
One Oxford Centre
Pittsburgh, PA 15219

(412) 263-1833

MOTION FOR POST-CONVICTION COLLATERAL RELIEF

AND NOW comes the defendant, William Fiore, by his attorney, Harold Gondelman, and moves your Honorable Court for post-conviction collateral relief and in support thereof sets forth as follows:

1. The defendant is William Fiore.

2. He is currently imprisoned in the Western Correctional Diagnostic and Classification Center of Pennsylvania and has been so confined since February 23, 1988 plus approximately two months served prior thereto.

3. The defendant was sentenced upon his conviction of operating a hazardous waste facility without a permit for a total of five to ten years upon counts I and II and fines totalling $200,000.00, as will more particularly appear by a copy of the Order in question attached to the exhibits filed in support of this motion as Exhibit 1.

4. The defendant was sentenced on April 10, 1987.

5. The defendant was convicted by a jury on Counts I and V and by the Court without a jury on Count II.

6. The sentences were imposed on said date and the defendant is now serving those sentences.

7. The judge who presided at the trial and imposed sentence is the Honorable Raymond A. Novak.

8. Post-conviction motions were denied by the Honorable Raymond A. Novak and an appeal was taken to the Superior Court to No. 485 Pittsburgh Term, 1988, which Court affirmed the conviction. A copy of the Memorandum Opinion of the Superior Court dated May 12, 1989 is attached to the exhibits submitted with this motion as Exhibit "2".

9. A petition for allocatur was filed with the Supreme Court of Pennsylvania to No. 507 W.D. Allocatur Docket, 1989, which petition was denied on

August 1, 1991, as shown by the exhibit attached as Exhibit "3".

10. The co-defendant Dave Scarpone appealed to the Commonwealth Court and on August 5, 1991 said Court, at No. 75 T.D. 1987, reversed his judgment of sentence insofar as operating without a permit is concerned. The Commonwealth appealed that decision and the Supreme Court, on December 15, 1993, affirmed the Commonwealth Court. For the convenience of the Court, the decision of the Supreme Court is submitted with the exhibits as Exhibit "4".

11. An application for extraordinary relief and appendix was filed on behalf of William Fiore at No. 9 W.D. Misc. Docket 1992, which requested that the Fiore matter decided by the Superior Court be taken by the Supreme Court and consolidated with the Scarpone appeal. That application was denied on March 25, 1992.

12. On January 27, 1993, an emergency application for extraordinary relief and appendix were filed with the Supreme Court to No. 7 W.D. Misc. Docket 1994 attempting to have the Supreme Court eliminate the anomalous result existing, namely that Scarpone has not committed a crime of operating a facility without a permit because the statute does not apply but Fiore is imprisoned on the identical fact situation.

13. On March 22, 1994, the Supreme Court denied the emergency application for extraordinary relief.

14. There are no further matters pending relating to the sentences for which Fiore is presently incarcerated. The attorneys who represented Fiore are Robert Ging,

Esquire and Martin W. Sheerer, Esquire and Harold Gondelman, Esquire in seeking review by the Supreme Court as above referenced.

15. The relief requested is the vacating of the sentences at Counts I and II by reason of the Supreme Court having held that the facts charged in the indictment do not constitute a crime.

16. In the Commonwealth's answer to Fiore's petition to the Supreme Court for extraordinary relief, it was alleged that Fiore did not preserve the grounds for appeal as Carpone's [sic] counsel did. Attorney Sheerer in his brief to the Superior Court specifically raised the issue that

> "As a site permittee, appellant [Fiore] could not be guilty of operating a hazardous waste disposal without a permit for such disposal facility because he already had one." See Exhibit 5, pages 13 and 14 submitted as an exhibit in support of this motion."

17. As set forth on page 8 of the Opinion of the Supreme Court, it was held:

> "We granted review in this case because of a conflict between the intermediate appellate courts in deciding the permit issue. Scarpone and his co-defendant Fiore were both charged with and found guilty of operating without a permit."

18. On page 9 of the Opinion the Supreme Court held:

> "The two courts are clearly in conflict and this leaves the Attorney General's office ill-advised

on how it should proceed in such situations. We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit against Mr. Scarpone under the statute. Simply put, Mr. Scarpone did have a permit."

19. At the trial of Mr. Fiore, the jury submitted the following question to the Court:

> "By law does a permit violation automatically 'revoke' – that is the jury's word – or suspend that permit, or must it be worded so in the permit?"

20. A copy of the transcript of those proceedings is attached to the exhibits submitted with this motion as Exhibit 6.

21. As stated in the Opinion of the Supreme Court, the Fiore and Scarpone appeals first went to the Superior Court which *sua sponte* sent them to the Commonwealth Court. On Fiore's prior counsel's motion the Commonwealth Court sent his case back to the Superior Court but retained the Scarpone case. Thus, the two courts had the same fact situation before them and reached diametrically opposite results.

22. If the Commonwealth persists in its position that Fiore did not preserve the issue that he could not be guilty of operating without a permit when he in fact had a permit, then this motion must be treated as raising the issue of ineffective assistance of prior counsel so the matter would be before this Court on its merits.

23. In light of the Supreme Court decision which was designed to give the Attorney General of the Commonwealth of Pennsylvania guidance in prosecuting violations relating to permits, the admonition of Justice Sutherland in *Berger v. United States*, 294 U.S. 78, 55 S.Ct. 619 (1935), is apposite:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all: and whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that the guilty shall not escape or innocence suffer . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

24. In this case it is obvious that one defendant whose case was decided by the Commonwealth Court has been found not to have committed a crime under the identical facts produced against Fiore which resulted in his conviction being sustained by the Superior Court.

25. Although Fiore, through counsel, did everything to try to avoid the incongruous result that presently exists by filing motions with the Supreme Court he nevertheless is placed in the position of having to proceed before the trial court since the matter has not been decided by any appellate court on the merits.

26. What Fiore is charged with having done is not a crime as decided by the Supreme Court of Pennsylvania on these very facts.

27. The sentence of the Court should be vacated by reason of the adjudication by the Supreme Court of Pennsylvania. Vacating the sentences on those counts which the Supreme Court has found not violative of the statute would make Fiore eligible for immediate release from incarceration.

WHEREFORE, William Fiore prays your Honorable Court for a hearing on this motion and, after hearing, for the vacating of the orders of sentence imposed on April 10, 1987 and further prays your Honorable Court for bond pending disposition of this motion.

ARGUMENT IN SUPPORT OF MOTION

The motion filed on behalf of William Fiore is both under the Pennsylvania Rules of Criminal Procedure Rule 1501 *et seq.* and the Post-Conviction Relief Act, 42 Pa.C.S.A. § 9541 *et seq.* Under the Act, § 9543(a)(2)(i) provides for relief if the conviction or sentence resulted from "a violation of the . . . laws of this Commonwealth . . . which in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." The facts in this case are peculiar, to say the least. Scarpone's conviction has been set aside by the Supreme Court of Pennsylvania for the reason that he was acting under a permit issued to Fiore and Fiore's business entities. The Supreme Court held that his actions, therefore, could not be a violation of operating without a permit

since Fiore in fact had a permit. Fiore, on the other hand, is incarcerated because although he had a permit the courts have not found that the same evidence that convicted Scarpone exonerates Fiore.

In the Federal Court system after the Supreme Court of the United States in *McNally v. United States*, 107 S.Ct. 2875 (1987), repudiated the intangible rights theory of mail fraud cases, defendants who had been convicted and whose convictions were final were able to move under 28 U.S.C. § 2255 to vacate their sentences. Attached to the exhibits submitted with the motion is an opinion of Judge Plunkett, of the District Court for the Northern District of Illinois, Eastern Division, in *United States v. Lovett*. The Court held that the instructions in the *Lovett* case allowed the jury "to convict for conduct that is outside the scope of the mail fraud statute" as later determined by the Supreme Court of the United States in *McNally*. He held, therefore, that the conviction had to be vacated (see page 11). The discussion in the *Lovett* case is interesting because it deals with the retroactivity of the *McNally* decision.

Fiore's motion is more persuasive since it isn't a question of retroactivity. The Supreme Court has found specifically that the facts introduced against Fiore, being the same facts introduced against Scarpone, "did not make out the crime of operating a waste disposal facility without a permit. Simply put, Mr. Scarpone did have a permit." As stated, that permit was Fiore's permit. The Supreme Court further held in facts applicable to this very case "But to conclude that the alteration constituted the operation of a new facility *without a permit* is a bald

fiction we cannot endorse. Penal provisions of the statute must be strictly construed under 1 P.S. § 1928(b)(1)."

The American Bar Association's Project on Criminal Justice, referring to the prosecution function, states, under 3-1.1 (c):

> The duty of the prosecutor is to seek justice, not merely to convict.

At 3-1.4 the ABA states:

> "It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action."

Under Rules of Professional Conduct, Rule 3.8, the prosecutor in a criminal case is told to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.

The Supreme Court decision in Scarpone is equally applicable to Fiore. At page 8 of the slip opinion the Supreme Court stated:

> "We granted review in this case because of a conflict between the intermediate appellate courts in deciding the permit issue. Scarpone and his co-defendant Fiore were *both* charged with and found guilty of operating without a permit."

On page 9 of the slip opinion, the Supreme Court held:

> "The two courts are clearly in conflict and this leaves the Attorney General's office ill-advised on how it should proceed in such situations. We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit against Mr. Scarpone under the statute."

The Attorney General would be ill-advised to institute an action against the operator of a hazardous waste facility under the facts presented against Mr. Fiore now that the Supreme Court has spoken. It is respectfully submitted to the Attorney General, as well as to this Court, that being sworn to uphold the laws of the Commonwealth of Pennsylvania, the Attorney General's office should join in this motion to vacate the felony convications [sic] against Fiore when the Supreme Court has held that no crime has been committed. The conviction and sentences against Fiore relating to the operation of a facility without a permit should be vacated and he should be discharged from custody.

Respectfully submitted,

_____

Harold Gondelman

Attorney for Defendant

VERIFICATION

I, WILLIAM FIORE, defendant within named, have read the foregoing Motion for Post-Conviction Collateral Relief and state that the averments of fact made in said Motion for Post-Conviction Collateral Relief are true and correct, to the best of my knowledge, information and belief.

I understand that false statements herein are made subject to penalty of 18 Pa.C.S., Section 4904, relating to unsworn falsification to authorities.

/s/ William Fiore
William Fiore

DATED: March 28, 1994

CERTIFICATE OF SERVICE

Service of a true and correct copy of the foregoing Motion was made on the following named persons the _____ day of _____, 1994, by forwarding the same to him, at his office addresses, via U.S. mail, postage prepaid, addressed as follows:

Ernest D. Preate, Jr., Esquire
Attorney General
Office of the Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	NUMBER: CC8508740
VS.	RESPONSE TO DEFENDANT'S MOTION FOR POST CONVICTION RELIEF
WILLIAM FIORE	FILED ON BEHALF OF THE COMMONWEALTH OF PENNSYLVANIA

COUNSEL OF RECORD FOR THE COMMONWEALTH OF PENNSYLVANIA

ERNEST D. PREATE, JR.
ATTORNEY GENERAL
COMMONWEALTH OF
PENNSYLVANIA

FRANK J. GRZYWINSKI
DEPUTY ATTORNEY GENERAL
PA. ID# 42094

OFFICE OF
ATTORNEY GENERAL
ENVIRONMENTAL CRIMES
SECTION
400 WATERFRONT DRIVE
PITTSBURGH, PA 15222
(412) 442-4283

COMMONWEALTH'S RESPONSE TO DEFENDANT'S MOTION FOR POST CONVICTION RELIEF

AND NOW, comes the Commonwealth of Pennsylvania through its attorney, Ernest D. Preate, Jr., Attorney General of the Commonwealth of Pennsylvania, Mark

Bellavia, Chief Deputy Attorney General and Frank J. Grzywinski, Deputy Attorney General who in response to defendant's Motion for Post Conviction Relief answers as follows:

1. Admitted.

2. Admitted.

3. Admitted. In way of further answer the Commonwealth would note that in addition to serving a sentence of incarceration at No. CC8508740 that the defendant was also convicted and serving a period of incarceration at CC8509328.

4. Admitted that defendant was sentenced on April 10, 1987 at CC8508740. However, the defendant was sentenced at 8509328 on April 14, 1987.

5. Admitted.

6. Admitted, as previously set forth in paragraphs 3. and 4.

7. Admitted.

8. Admitted.

9. Admitted.

10. It is admitted that Scarpone appealed to Commonwealth Court, however Scarpone also appealed the Commonwealth Court decision to the Supreme Court.

11. Admitted in part that defendant requested extraordinary relief. However, it is denied that defendant Fiore is eligible for extraordinary relief.

12. It is admitted that a petition was filed, but denied that defendant is entitled to any relief.

13. Admitted that the Supreme Court denied relief. However, it is denied that defendant Fiore is eligible for post conviction relief.

14. Denied. In way of further answer, the Commonwealth asserts the defendant is currently awaiting sentencing on related charges in the Court of Common Pleas of Westmoreland County. In addition, the Commonwealth would note that the defendant had been represented by Robert Ging, Esquire at CC8508740; John Doherty, Esquire at CC8509328; Timothy Sheerer, Esquire at 8509328; Martin W. Sheerer on appeal at 8508740 and 85009329; and Allen Bruenwasser, Esquire on a Petition for Writ of Habeas Corpus filed at CC8508740, and CC8509328.

15. Denied. The Commonwealth asserts the defendant is not entitled to any relief from the sentences imposed at Counts 1 and 2 since the Supreme Court has denied defendant's request for emergency extraordinary relief. Moreover, the decision of *Scarpone* may not be retroactively applied to the petitioner since his case was not on direct appeal and the issue has not been properly preserved. *Commonwealth vs. Ahearn*, 516 A.2d. 45 (Pa. Super. 1986). See *Commonwealth vs. Khorey*, 555 A.2d. 100 (Pa. 1989) defendant who had withdrawn guilty plea was not entitled to withdraw plea when co-defendant, who pressed on with challenge to Attorney General jurisdiction was successful in having charges dismissed.

16. Denied. While it is admitted that the Commonwealth responded that defendant Fiore did not preserve the issue for appeal, it is denied that Attorney Sheerer raised the issue as set forth as set forth [sic] by petitioner.

In way of further answer, the Commonwealth would note that in the concise statement of matters complained of on appeal filed by Martin W. Sheerer, Esquire on May 21, 1987 the petitioner raises a sufficiency of evidence argument, while defendant, Scarpone argued at No. 75 TD 1987 that "the legislature provided a specific, exclusive, constitutionally adequate method for determination as to whether a permit should be issued, denied, modified, suspended, or revoked." Thus Scarpone argued that he could have only been charged with operating without a permit if the permit had first been revoked through the administrative action of the Department of Environmental Resources contrary to Petitioner's argument on appeal.

17. Admitted. In way of further answer, Commonwealth would note the Supreme Court granted allocatur since "the two courts are clearly in conflict and this leaves the Attorney General's Office ill advised on how it should proceed in such situations." 634 A. 2d 112 (Pa. 1993). In way further [sic] answer the Commonwealth would note that the Supreme Court did not state that defendant Fiore should be granted any relief in the *Scarpone* decision, and refused to grant relief on his application for extraordinary relief No. 9 W.D. 1992 and emergency application for extraordinary relief at No. 7 W.D. 1994.

18. Admitted.

19. Denied. At this time, the Commonwealth has no knowledge of the aforementioned averment.

20. Admitted.

21. Admitted.

22. Admitted that defendant did not preserve the present issue. However, it is denied that this motion may be treated as an issue of ineffective assistance of prior counsel since a bald allegation of ineffectiveness will not be entertained in a PCRA proceeding. See *Commonwealth vs. Korb*, 617 A.2d. 715 (Pa. Super. 1992); *Commonwealth vs. Austin*, 417 A.2d. 1220 (Pa. Super. 1980).

23. It is denied that *Berger vs. United States* is applicable to the present situation.

24. While it is admitted that opposite conclusions were reached by the Commonwealth Court and Superior Court, it is denied that defendant Fiore is entitled to any relief pursuant to paragraphs 16, 17 and 22.

25. Denied.

26. Denied, on the contrary, petitioner's conviction was upheld at 485 Pgh 1988 and Allocatur was denied at 27 W.D. Misc. Docket 1987.

27. Denied. In way of further answer, the Commonwealth would note that the only remedy which would be available to defendant Fiore if this Honorable Court would be persuaded to retroactively apply *Scarpone*, would be to be resentence the petitioner pursuant to *Commonwealth vs. Goldhammer*, 517 A.2d. 1280 (Pa. 1986). However, the Commonwealth once again avers that the defendant is not entitled to any relief since the issues raised in the present petition have been finally litigated.

WHEREFORE, the Commonwealth respectfully requests this Honorable Court to deny the instant petition without a hearing.

RESPECTFULLY SUBMITTED,

ERNEST D. PREATE, JR.
Attorney General

BY: /s/ Frank J. Grzywinski
FRANK J. GRZYWINSKI
Deputy Attorney General

MARK A. BELLAVIA
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that the Commonwealth's Response to Defendant's Motion for Post Conviction Relief has been served on the following counsel via first class mail, postage pre-paid on May 26, 1994.

Harold Gondalman, Esquire
38th Floor, One Oxford Centre
Pittsburgh, PA 15219

ERNEST D. PREATE, JR.
Attorney General

BY: /s/ Frank J. Grzywinski
FRANK J. GRZYWINSKI
Deputy Attorney General

MARK A. BELLAVIA
Chief Deputy Attorney General

COMMONWEALTH of Pennsylvania

v.

William FIORE, Appellant.

Superior Court of Pennsylvania.

Argued March 22, 1995.

Filed Sept. 20, 1995.

Harold Gondelman, Pittsburgh, for appellant.

John M. Popilock, Deputy Attorney General, Harrisburg, for Commonwealth, appellee.

Before ROWLEY, President Judge, and KELLY and HOFFMAN, JJ.

ROWLEY, President Judge:

Appellant, William Fiore, appeals from the trial court's order of August 18, 1994, denying his petition for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 et seq. At the heart of this appeal is the fact that although appellant's employee and co-defendant, David Scarpone, has obtained from the courts of this Commonwealth a reversal of his conviction on the charge of operating a hazardous waste facility without a permit, appellant has failed to obtain the same relief. Such a result, appellant contends, deprives him of the due process of law and the equal protection of the laws and subjects him to cruel and unusual punishment.

Appellant maintains that, under the PCRA, we are empowered to grant the relief that he seeks in the form of a writ of coram nobis. After a careful review of the record and appropriate case law, however, we conclude that the relief sought by appellant is not available from this Court.

Appellant's argument rests on a complex procedural history. Appellant, owner of Municipal and Industrial Disposal Company (MIDC), a waste disposal facility, was charged with over 150 criminal and environmental law violations under the Solid Waste Management Act (SWMA), 35 P.S. § 6018.101 et seq., and related statutes. Scarpone, appellant's employee and general manager, was also charged with various violations, including conspiracy, 18 Pa.C.S. § 903, and obstructing the administration of law or other governmental function, 18 Pa.C.S. § 5101. Both individuals were charged with violating 35 P.S. § 6018.401(a), operating a hazardous waste disposal facility without a permit,[1] the offense at issue in this

---

[1] § 6018.401. Management of hazardous waste

(a) No person or municipality . . . shall own or operate a hazardous waste storage, treatment or disposal facility unless such person or municipality has first obtained a permit for the storage, treatment and disposal of hazardous waste from the [D]epartment [of Environmental Resources]. . . .

35 P.S. § 6018.401(a). The Commonwealth proceeded against Scarpone on a theory of accomplice liability under § 6018.610, which reads in pertinent part as follows:

It shall be unlawful for any person or municipality to:

. . . .

(9) Cause or assist in the violation of any provision of this act, any rule or regulation of the department, any order of the department or any term or condition of any permit.

35 P.S. § 6018.610(9). *See Scarpone v. Commonwealth*, 141 Pa.Commw. 560, 596 A.2d 892 (1991), discussed infra.

appeal. This offense is a felony of the second degree pursuant to § 6018.606(f).[2]

In February 1986, appellant and Scarpone were jointly tried by a jury in a trial limited to charges against both defendants. Both were found guilty of violating § 6018.401(a), among other charges. In a non-jury trial in July, 1986, appellant was tried on those charges which did not involve Scarpone. This trial also resulted in appellant's conviction of, *inter alia*, violating § 6018.401(a). As a result of both trials, appellant was convicted on a total of sixty counts. Post-trial motions were filed and denied.

A single proceeding was held on April 10, 1987, for the imposition of sentence on appellant's convictions resulting from both trials. Although appellant had been convicted on sixty counts, the trial court sentenced him on only the following three:

> Count 1, Trial 1 (violating § 6018.401(a)): two and one-half to five years imprisonment, ten years probation, and a fine of $100,000;

---

[2] § 6018.606 Criminal penalties

. . . .

(f) Any person who stores, transports, treats, or disposes of hazardous waste within the Commonwealth in violation of section 401, or in violation of any order of the department shall be guilty of a felony of the second degree and, upon conviction, shall be sentenced to pay a fine of not less than $2,500 but not more than $100,000 per day for each violation or to imprisonment for not less than two years but not more than ten years, or both.

35 P.S. § 6018.606(f) (footnote omitted).

Count 2, Trial 2 (violating § 6018.401(a)): two and one-half to five years imprisonment and ten years probation, to run consecutive to the sentence imposed at Count 1, and a fine of $100,000; and

Count 5, Trial 1 (perjury, 18 Pa.C.S. § 4902): one to two years imprisonment and five years probation, to run consecutive to the previous sentences.

The trial court explained that "I do not mean to minimize the other counts. We feel that this penalty is severe and we therefore direct the Clerk to enter no further penalty on all remaining counts." Notes of Testimony at 69-70. Appellant filed a motion to modify sentence, which was denied. Appellant then appealed to this Court.

On September 28, 1987, this Court, acting sua sponte and citing the Commonwealth Court's exclusive jurisdiction over appeals involving criminal proceedings arising from violations of regulatory statutes administered by Commonwealth agencies, 42 Pa.C.S. § 762(a)(2)(ii), transferred appellant's appeal to the Commonwealth Court. Appellant petitioned the Commonwealth Court to return his appeal to this Court. The Commonwealth Court granted appellant's petition on February 29, 1988, noting that the facts and issues of the present appeal were closely related to another appeal taken by appellant to this Court.

In an unpublished memorandum decision filed May 12, 1989, this Court affirmed appellant's judgment of sentence. *Commonwealth v. Fiore*, 391 Pa.Super. 634, 563

A.2d 189 (1989) 485 Pittsburgh 1988. Noting that appellant had raised 22 issues on appeal, all of which had been addressed by the trial court in a comprehensive opinion, the Court affirmed on the trial court's opinion. Because appellant had failed to include in his brief a statement pursuant to Pa.R.A.P. 2119(f) and the Commonwealth had objected to its omission, the Court also quashed the appeal insofar as it involved the alleged excessiveness of the sentence.

Appellant then petitioned the Supreme Court for allowance of appeal. In an order entered March 13, 1990, the Supreme Court denied the petition (No. 310 W.D. Alloc.Dkt.1989), thereby concluding appellant's direct appeal.[3]

Meanwhile, Scarpone appealed to this Court from his judgment of sentence. As was the case with appellant, this Court transferred the appeal sua sponte to the Commonwealth Court. Scarpone did not seek to have the appeal returned to this Court.

In a decision filed on August 5, 1991, more than a year after the conclusion of appellant's direct appeal, the Commonwealth Court reversed Scarpone's conviction on

---

[3] We note that in appellant's PCRA petition, to be discussed *infra*, counsel for appellant states that the petition for allowance of appeal in the present case "was filed with the Supreme Court of Pennsylvania to No. 507 W.D. Allocatur Docket, 1989, which petition was denied on August 1, 1991. . . ." The docket number and date supplied by counsel are incorrect; counsel has confused the petition for allowance of appeal in this case with the petition for allowance of appeal filed by appellant (and denied) in a different appeal.

the charge of causing and assisting in the operation of a hazardous waste facility without a permit, as well as his conviction on the related charge of conspiracy. *Scarpone v. Commonwealth*, 141 Pa.Commw. 560, 596 A.2d 892 (1991). The Court held that the Department of Environmental Resources had issued a valid permit to MIDC, the waste facility in question. The Court reasoned that the alteration of a monitoring pipe, although a clear violation of the condition of the permit, did not result in the operation of a new facility that did not have a permit. Because MIDC had a valid permit, the Court held, Scarpone could not be convicted of causing and operating a waste disposal plant without a permit. The Court confirmed Scarpone's conviction on the charge of obstructing the administration of law or other governmental function.

Scarpone petitioned the Supreme Court for allowance of appeal in order to challenge the affirmance of his conviction on the obstruction charge. The Commonwealth, seeking to challenge the reversal of Scarpone's conviction on the permit charge, filed a cross-petition for allowance of appeal. The Supreme Court granted both petitions.

Although appellant's direct appeal was already concluded, he filed with the Supreme Court an application for extraordinary relief (No. 9 W.D.Misc.Dkt.1992), asking the Court to take jurisdiction of his case pursuant to the Court's King's Bench powers, 42 Pa.C.S. § 726, and to consolidate it with Scarpone's appeal "so that a uniform interpretation in the Commonwealth of the Solid Waste Management Act and the penal provisions thereunder will be obtained." Application for Extraordinary Relief at 5. The Court denied the application on March 25, 1992.

In an opinion filed on December 15, 1993, the Supreme Court affirmed the Commonwealth Court's decision in Scarpone's case. *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993). The Court explained the situation as follows:

> We granted review in this case because of a conflict between the intermediate appellate courts in deciding the permit issue. Scarpone and his co-defendant Fiore were both charged with and found guilty of operating without a permit.
>
> Scarpone took his appeal to the Commonwealth Court and that court found it impossible to conclude that the alteration of the pipe resulted in the operation of a new facility for which no permit had been issued. Although the facility may have acted in breach of the permit it held, the court would not hold that this was tantamount to acting without any permit.
>
> Fiore took his appeal to the Superior Court and raised the issue by way of a sufficiency of the evidence argument. The Superior Court found the evidence sufficient and issued an unpublished memorandum opinion upholding his conviction of operating a hazardous waste facility without a permit. The two courts are clearly in conflict and this leaves the Attorney General's office ill-advised on how it should proceed in such situations.
>
> We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit against Mr. Scarpone under the statute. Simply put, Mr. Scarpone did have a permit. A more appropriate charge may have been brought under alternative provisions of the

statute. . . . [T]he SWMA has specific provisions providing a penalty for violations of the conditions of a permit. Under such circumstances, the Commonwealth must adhere to the legislative scheme in pursuing criminal charges. The alteration of the monitoring pipe here was execrable and constituted a clear violation of the conditions of the permit. But to conclude that the alteration constituted the operation of a new facility without a permit is a bald fiction we cannot endorse. Penal provisions of a statute must be strictly construed under 1 Pa.C.S. § 1928(b)(1).

We agree with the Commonwealth Court that the statutory language here cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection. The Commonwealth Court was right in reversing Mr. Scarpone's conviction of operating without a permit when the facility clearly had one.

Id. at 278-29, [sic] 634 A.2d at 1112 (emphasis in original). The Supreme Court affirmed Scarpone's conviction on the charge of obstructing the administration of law.

On January 27, 1993, appellant filed an "emergency application for extraordinary relief" (No. 7 W.D.Misc. Dkt.1994) with the Supreme Court. Again he urged the Court to utilize its King's Bench powers "to correct the anomalous situation of [appellant's] employee being discharged of criminal conduct under the identical facts and circumstances causing [appellant] to be imprisoned." Emergency Application for Extraordinary Relief at 9-10. The Supreme Court denied appellant's emergency application on March 22, 1994.

Appellant then filed the petition for post-conviction relief which has led to the present appeal.[4] In his PCRA petition, appellant urged the trial court to vacate the sentences imposed on the charges of operating a hazardous waste facility without a permit because "[w]hat [appellant] is charged with having done is not a crime as decided by the Supreme Court of Pennsylvania on these very facts." *Id.* at 6. In an order entered August 18, 1994, the trial court denied appellant's petition for post-conviction relief. This timely appeal followed.

We turn first to appellant's contention that the common law remedy of a writ of coram nobis continues to be available under the PCRA and that he is entitled to that remedy. The term "coram nobis" is defined as "in our presence" or "before us," and "[t]he essence of coram nobis is that it is addressed to the very court which renders the judgment in which injustice is alleged to have been done, in contrast to appeals or review directed to another court. . . . " Black's Law Dictionary 304-05 (5th ed. 1979). In 1945 this Court explained the nature of the writ as follows:

---

[4] The trial court states that this is appellant's second collateral attack on his conviction, the first having been a petition for writ of habeas corpus filed on appellant's behalf by Allen Brunwasser, Esq., on July 17, 1989, and denied by the trial court on October 24, 1989. This petition was essentially a challenge to the revocation of appellant's bond. Even if we were to apply to the present request for post-conviction relief the heightened standard set forth in *Commonwealth v. Lawson*, 519 Pa. 504, 549 A.2d 107 (1988), for a second or any subsequent such petition, the result in this case would be unchanged.

> The writ of error coram nobis is an ancient common law writ, the purpose of which is to bring before a court a judgment previously rendered by it for review or modification, on account of some error of fact and not of law affecting the validity and regularity of the proceedings, and which was not brought into the issue at the trial thereof.

Commonwealth v. Morrison, 158 Pa.Super. 311, 313, 44 A.2d 850, 851 (1945) (citation omitted; emphasis added). This Court suggested that the writ would lie, for example, where the error concerned the status of a party, such as an infant, or where an accused was forced to plead guilty owing to a well-founded fear of mob violence. *Id.* The Supreme Court has emphasized that the writ of error coram nobis "is a procedural tool whose 'purpose . . . is to correct errors of fact only. . . . ' " *Commonwealth v. Mangini*, 478 Pa. 147, 163, 386 A.2d 482, 490 (1978), quoting *Commonwealth v. Orsino*, 197 Pa.Super. 306, 313-14, 178 A.2d 843, 846 (1962). Moreover,

> [a] review of the cases in which the writ of coram nobis has been successfully invoked shows that the true rule governing the use of the writ is that one which is aptly expressed in section 94 of Freeman on Judgments, quoted in *Sanders v. State*, 85 Ind. 318, 44 Am.Rep. 29, 35, as follows: "The writ of error coram nobis is not intended to authorize any court to review and revise its opinions; but only to enable it to recall some adjudication, made while some fact existed which if before the court would have prevented the rendition of the judgment, and which without any fault or negligence of the party was not presented to the court."

Commonwealth v. Harris, 351 Pa. 325, 329-30, 41 A.2d 688, 691 (1945) (emphasis added). The writ of error coram nobis is generally regarded as an extraordinary remedy. *Commonwealth v. Mangini, supra*. It is not issued, for example, simply because a witness later recants or changes his or her testimony, for "there would be no finality to any conviction of crime if verdicts and judgments could be thus easily nullified." *Commonwealth v. Mathews*, 356 Pa. 100, 102, 51 A.2d 609, 610 (1947), cited in *McKnight v. Commonwealth, Department of Transportation*, 121 Pa.Commw. 28, 549 A.2d 1356, 1358-59 (1988).

The case law just cited suggests that even if the remedy of coram nobis were available to appellant in the present procedural context, he would nevertheless not qualify for it because the issue that he raises is not a factual one. However, in support of his claim that he is entitled, via his PCRA petition, to the remedy of coram nobis, appellant directs us to the opinions of the Pennsylvania Supreme Court in *Commonwealth v. Sheehan*, 446 Pa. 35, 285 A.2d 465 (1971), and *Commonwealth v. Conner*, 462 Pa. 282, 341 A.2d 81 (1975).

In *Sheehan*, the appellant, while not represented by counsel, pled guilty to a charge of driving while intoxicated and paid a fine of $200. When he was charged with a second such offense five years later and learned that conviction for a second offense would merit a term of imprisonment, he petitioned for relief pursuant to the then-effective Post Conviction Hearing Act (PCHA), predecessor to the PCRA, asserting that his first conviction was invalid because his constitutional right to counsel had been denied. The trial court denied the petition,

noting that appellant failed to meet the PCHA's requirement that, to be eligible for relief, a petitioner must be incarcerated or on probation or parole. This Court affirmed.

On appeal to the Supreme Court, appellant argued that if his claim was not cognizable under the PCHA, his petition should be treated as one for a writ of coram nobis or habeas corpus. The Supreme Court observed that

> [t]he intent of the [Post Conviction Hearing] Act . . . was not to abolish the common law remedies of habeas corpus or coram nobis, but rather to promulgate an exclusive, well-defined procedure for the presentation of those grievances set forth in the Act by an aggrieved person who is under the duress of punishment, whether in prison or on parole or probation. All claims previously cognizable on a common law writ, in circumstances not covered by the terms of the Act, may still be litigated by means of the common law writ.

Sheehan, 446 Pa. at 39, 285 A.2d at 467 (citations and footnote omitted). After noting the limited scope of coram nobis, the Court took guidance from the Supreme Court of the United States:

> [A]fter noting that courts should act by whatever procedural channels appear necessary to do justice when the record makes plain a right to relief, the United States Supreme Court in *United States v. Morgan*, 346 U.S. 502, 505, [74 S.Ct. 247, 249], 98 L.Ed. 248, 253 (1954)[,] held that, on an allegation of the denial of right to counsel, coram nobis would lie to challenge a conviction, the sentence of which had been fully satisfied. The Court laid particular emphasis on

> a quotation from 2 Tidd's Practice (4th Am.Ed.) 1136, 1137, which stated that coram nobis is available to cure errors of fact or process. *See* [Judge Hoffman's dissenting opinion in *Commonwealth v. Sheehan*, 216 Pa.Super. 26, 260 A.2d 496 (1969),] and cases cited therein. Likewise, the Court in Morgan noted that coram nobis as applied in American jurisdictions had not been confined strictly to matters of fact.

Id. at 40, 285 A.2d at 468. Our Supreme Court concluded that appellant's petition should be treated as a petition for a writ of coram nobis and remanded the case to the trial court for a hearing to determine whether appellant had knowingly waived his right to counsel.

The appellant in *Conner* sought relief in the form of a writ of coram nobis after his direct appeal from a judgment of sentence for voluntary manslaughter proved unsuccessful. The trial court denied the relief sought. On appeal, the Supreme Court acknowledged that appellant should have sought relief under the PCHA. Nevertheless, because the trial court had considered the merits of appellant's claims, the Supreme Court decided in the interest of judicial economy to treat the claims as having been raised under the PCHA. In doing so, the Court relied upon its earlier opinion in *Sheehan* and upon the reasoning of the United States Supreme Court in *Morgan, supra*, that "courts should act by whatever procedural channels appear necessary to do justice when the record makes plain a right to relief." *Conner*, 462 Pa. at 286, 341 A.2d at 83.

This Court subsequently interpreted the Supreme Court's decision in *Sheehan* as having "expanded the

scope of a writ of coram nobis in Pennsylvania from being restricted to challenges on the validity of a judgment based on facts not previously before the court, to include matters of law." *Commonwealth v. Fay*, 294 Pa.Super. 332, 336, 439 A.2d 1227, 1229 (1982). *See also Commonwealth v. Bucci*, 283 Pa.Super. 125, 423 A.2d 747 (1980) (PCHA did not abrogate common law writs which cover situations not covered by PCHA); *Commonwealth v. Mervin*, 263 Pa.Super. 498, 398 A.2d 687 (1979) (writ of error coram nobis still exists, but has been supplanted by PCHA except in rarest situation).

Appellant is not proceeding under the PCHA, however, but under its successor statute, the PCRA, which went into effect April 13, 1988. This Court *en banc* has observed that

> [t]he PCRA . . . is a complete amendment to the prior post conviction relief statute[,] the [PCHA]. A review of the modifications and amendments to the PCHA shows that almost the entire statutory language of the PCHA was stricken and replaced by new language in the PCRA.

Commonwealth v. Hayes, 408 Pa.Super. 68, 72, 596 A.2d 195, 197 (1991) (*en banc*), *appeal denied*, 529 Pa. 646, 602 A.2d 856 (1992). Accordingly, we are required to decide whether coram nobis survives as an alternative remedy outside of the PCRA.

We note, first, a difference in the wording of the sections setting forth the scope of the former and the present statutes. The drafters of the PCHA described its scope as follows:

> This subchapter establishes a post conviction procedure for providing relief from convictions obtained and sentences imposed without due process of law. The procedure established in this subchapter shall encompass all common law and statutory procedures for the same purpose that exist when this subchapter takes effect, including habeas corpus and coram nobis. However, nothing in this subchapter limits the availability of remedies in the trial court or on direct appeal.

42 Pa.C.S. § 9542 (repealed) (emphasis added). The drafters of the PCRA chose the following language:

> This subchapter provides for an action by which persons convicted of crimes they did not commit or serving unlawful sentences may obtain collateral relief and for an action by which persons can raise claims which are properly a basis for Federal habeas corpus relief. The action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including habeas corpus and coram nobis. This subchapter is not intended to limit the availability of remedies in the trial court or on direct appeal from the judgment of sentence, nor is this subchapter intended to provide a means for raising issues waived in prior proceedings.

42 Pa.C.S. § 9542 (emphasis added).

In *Commonwealth v. Hayes, supra*, this Court *en banc* addressed the significance of the change in wording. In that case, as in *Sheehan*, the defendant filed a petition for

post-conviction relief in order to challenge a conviction, the sentence for which had expired, but which had led to a collateral consequence in the form of an increased sentence for a later offense. The eligibility provision of the PCHA had required that a petitioner be "incarcerated in this Commonwealth under a sentence of death or imprisonment or on parole or probation." 42 Pa.C.S. § 9543(2). Because the appellant was proceeding under the PCRA, however, he was required to be "currently serving a sentence of imprisonment, probation or parole for the crime. . . . " 42 Pa.C.S. § 9543(a)(1)(i).

In analyzing this change, the Court first applied two principles of statutory interpretation: 1) general and plain words must be given their common and accepted meaning; and 2) it must be assumed that the drafters of a statute intende every word of it to have effect. The conclusion reac was that "the language changes in the PCRA were deliberately made to confront and alter the collateral criminal consequences rule" and that to interject that rule into the PCRA would mean ignoring "the legislative intent and the plain meaning of the word changes made in the PCRA." *Id.* at 76, 596 A.2d at 199 (footnote omitted).

As further support for its conclusion, the Court pointed to the legislature's decision to declare a petition pursuant to the PCRA "the sole means of obtaining collateral relief. . . . " 42 Pa.C.S. § 9542 (emphasis added). "This statutory language clearly evidences a legislative intent to change the prior decisional law and restrict the scope of collateral post conviction challenges." *Id.* at 77, 596 A.2d at 200.

Although this Court *en banc* was not directly presented in Hayes with the question whether the common law writ of coram nobis survives as a post-conviction remedy outside the PCRA, the conclusion that the writ does not survive follows directly from the Court's interpretation of the drafters' intent. If we were to allow appellant to petition for a writ of coram nobis without satisfying the eligibility requirements of the PCRA, we will have created a second means of obtaining collateral relief, thereby contravening the legislative intent that the PCRA be the sole means of obtaining such relief. Accordingly, we conclude that appellant is not eligible for post-conviction relief in any form unless he meets the eligibility requirements set forth in the PCRA.

One such requirement is the obligation to plead and prove by a preponderance of the evidence that the allegation of error has not been previously litigated. 42 Pa.C.S. § 9543(a)(3). Section 9544 explains in pertinent part that "an issue has been previously litigated if . . . the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue. . . . " 42 Pa.C.S. § 9544(a)(2).

We agree with the trial court that appellant has failed to meet this requirement. As noted earlier, this Court disposed of the twenty-two issues raised in appellant's direct appeal by affirming on the trial court's opinion. The trial court addressed the present issue in the following terms:

> The defendant alleges that the evidence was insufficient to prove that he operated a hazardous waste disposal facility without a permit from the [DER] for such disposal facility.

> In essence, the defendant contends that he possessed a permit issued by the DER for his waste disposal facility during the time that he altered the groundwater monitoring system . . . and, as such, the existence of that permit constitutes an absolute defense to the charges. We find the defendant's contention unpersuasive.
>
> . . . .
>
> [T]he defendant's alterations of the 810 pipe represented such a significant departure from the terms of the existing permit that the operation of the hazardous waste facility was "unpermitted" after the alterations were undertaken by the defendant. Contrary to the defendant's contention, he did not possess all necessary permits; specifically, he did not possess a permit which allowed the disposal of hazardous waste after the monitoring system was altered. Therefore, we reject the defendant's contention as incorrect.

Trial Court Opinion, 1/19/88, at 44-48. The Supreme Court declined to allow appellant to appeal from this Court's decision. Appellant now asks this Court to grant him, in a post-conviction proceeding, the relief that was denied him on direct appeal. It is settled law that an issue litigated on direct appeal cannot be litigated again in a post-conviction proceeding. *Commonwealth v. Szuchon*, 534 Pa. 483, 486, 633 A.2d 1098, 1099 (1993). Accordingly, appellant is not entitled to relief under the PCRA.

In reaching this result, we have not overlooked the uniqueness of appellant's situation. Appellant was convicted of operating a waste management facility without a permit, and his conviction was affirmed. His general

manager, David Scarpone, was convicted of the same offense, and his conviction was reversed because, the appellate courts concluded, he had a permit. The permit in question was the same, however; it was appellant's as well as Scarpone's. Unsurprisingly, appellant views the situation as unjust.

Nevertheless, the crucial fact is that appellant's direct appeal was no longer pending when the Supreme Court made the ruling which appellant now seeks to have applied to his case. In *Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180 (1986), our Supreme Court considered "whether full retroactivity of a case encompasses a collateral attack on the conviction." *Id.* at 354, 516 A.2d at 1181. The Court held that

> a new rule of law to which we give full retroactive effect, will not be applied to any case on collateral review unless that decision was handed down during the pendency of an appellant's direct appeal and the issue was properly preserved there, or . . . is non-waivable.

Id. at 355, 516 A.2d at 1183.[5] *Accord Commonwealth v. Peterkin*, 538 Pa. 455, 649 A.2d 121 (1994); *Commonwealth v. Galloway*, 433 Pa.Super. 222, 640 A.2d 454 (1994), *appeal denied*, 538 Pa. 666, 649 A.2d 668 (1994); *Commonwealth v. Riggins*, 374 Pa.Super. 243, 542 A.2d 1004 (1988), *appeal denied*, 522 Pa. 583, 559 A.2d 527 (1989); *Commonwealth v. Carr*, 370 Pa.Super. 1, 535 A.2d 1120 (1987), *appeal denied*, 518 Pa. 648, 544 A.2d 960 (1988). In *Galloway*, for example,

---

[5] Although the Supreme Court's opinion was not joined in its entirety by a majority of the panel, a majority joined the Court's ruling on the question of retroactivity.

this Court held that a defendant whose conviction became final when the Supreme Court affirmed his judgment of sentence on September 24, 1981, was not entitled to post-conviction relief based on a ruling set forth in an opinion filed by the Supreme Court on October 19, 1981, barely a month later. We conclude, therefore, that there is no support in the case law of this Commonwealth for the result sought by appellant in this case.

Finally, we note that appellant has presented to the Supreme Court, via two petitions for extraordinary relief, the same issue that he raises here, and that the Supreme Court has denied both petitions without explanation. On this point, the trial court offered the following observation:

> This court cannot divine the reason why the Supreme Court has consistently and repeatedly denied extraordinary relief to [appellant] despite its decision in Scarpone. If it is because there must be some finality to these matters, and [because] justice does not require extraordinary relief, then this court concurs.

Trial Court Opinion, 2/17/95, at 8. To this we add the observation that 42 Pa.C.S. § 726, which confers extraordinary jurisdiction on the Supreme Court, does so only "in any matter pending before any court . . . of this Commonwealth . . . " (emphasis added).[6]

---

[6] Section 726 reads in its entirety as follows:

> Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or district justice of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.

42 Pa.C.S. § 726.

Most importantly, we are cognizant that "[t]he formal purpose of the Superior Court is to maintain and effectuate the decisional law of [the Supreme] Court as faithfully as possible." *Commonwealth v. Dugger*, 506 Pa. 537, 545, 486 A.2d 382, 386 (1985). Doing so in this case requires that we affirm the trial court's order denying appellant's petition for post-conviction relief.

Order affirmed.

HOFFMAN, J., files a concurring statement.

HOFFMAN, Judge, concurring:

As appellant's direct appeal was final when the Supreme Court decided *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993), and as his claim had already been previously litigated, I agree with my distinguished colleagues that appellant is not eligible for relief under the PCRA. *See* 42 Pa.C.S. § 9543(a)(3); Pa.C.S. § 9544; *Commonwealth v. DeHart*, 539 Pa. 5, 650 A.2d 38 (1994) (issues previously litigated may not be relitigated in PCRA action); *Commonwealth v. Gillespie*, 512 Pa. 349, 355, 516 A.2d 1180, 1183 (1986) (new rule of law will not be applied retroactively after appellant's direct appeal is final).

However, I write separately to emphasize that there are circumstances where a departure from the PCRA's stringent eligibility requirements is appropriate, such as

where there are extraordinary circumstances or a miscarriage of justice. *See Commonwealth v. Szuchon*, 534 Pa. 483, 633 A.2d 1098 (1993) (where a strong prima facie showing is offered to demonstrate that a miscarriage of justice occurred, a subsequent petition for post-conviction relief will be entertained); *Commonwealth v. Lyons*, 390 Pa.Super. 464, 568 A.2d 1266 (1989) (extraordinary circumstances may overcome petitioner's failure to raise issue below), *appeal denied*, 525 Pa. 663, 583 A.2d 792 (1990).

In the instant case, the evidence at trial clearly demonstrated that appellant deliberately altered the groundwater monitoring system, wrongfully discharged hazardous waste into an unnamed tributary of the Youghiogheny River, and lied under oath to the Commonwealth Court. Although appellant is serving a sentence for a conviction based upon evidence which would no longer support a conviction in Pennsylvania, I believe appellant's conviction was not a miscarriage of justice or an extraordinary circumstance warranting a departure from the provisions of the PCRA.

Accordingly, I concur.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM FIORE, Petitioner, vs. GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh, Respondent, and THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, Additional Respondent.	)	Case No. 961231

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

COUNSEL FOR PETITIONER:

JAMES B. LIEBER, ESQUIRE
PA I.D. # 21748
LIEBER & HAMMER, P.C.
5528 WALNUT STREET
PITTSBURGH, PA 15232-2312
(412) 687-2231

HAROLD GONDELMAN, ESQUIRE
PLOWMAN SPIEGEL & LEWIS, P.C.
SECOND FLOOR
THE GRANT BUILDING
310 GRANT STREET
PITTSBURGH, PA 15219-2204
(412) 471-8521

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

1. Name and location of court which entered the judgment under attack: The Court of Common Pleas of Allegheny County.

2. Criminal Docket No. CC No. 85-08740.

3. Date of imposition of sentence. April 10, 1987.

4. Length of sentence: two consecutive sentences of 2 1/2 to 5 years each, each followed by a 10-year period of probation, plus fines and costs.

5. Nature of offense or offenses for which you were convicted: Violation of the Solid Waste Management Act, 35 P.S. §§ 6018.401(a), 6018.601(f).

6. What was your plea? Not guilty

7. The finding of guilt was made by a jury.

8. Did you testify at the trial? Yes X No _

9. Did you appeal from the judgment of conviction? Yes.

10. (a) Appellate procedures:

a. Petitioner appealed sentence to Superior Court of Pennsylvania at Docket No. 646 Pittsburgh, 1987.

b. Superior Court *sua sponte* transferred Fiore appeal to Commonwealth Court.

c. Appeal transferred back to Superior Court and docketed at No. 485 Pgh. 1988.

d. Fiore's appeal to Superior Court resulted in an affirmance of the conviction in an unpublished Memorandum Opinion, at *Commonwealth v. Fiore*, 563 A.2d 189 (Pa. Super. 1989)

e. Fiore petitioned the Supreme Court of Pennsylvania for allowance of appeal, which was denied on March 13, 1990 at No. 310 W.D. Alloc Dkt. 1989.

f. Fiore filed a "Emergency Petition for Extraordinary Relief" to the Supreme Court to take jurisdiction of his case and consolidate it with the Scarpone appeal so there would not be conflicting results. That application was denied on March 25, 1992 at No. 9 W.D. Misc. Dkt. 1992.

g. On or about January 27, 1994, Fiore filed an "Emergency Petition for Extraordinary Relief" to the Supreme Court of Pennsylvania at 7 W.D. Misc. Dkt. 1994." The Supreme Court again denied petition.

(b) No petition for certiorari filed with the United States Supreme Court.

11. Other than direct appeal from the judgment of conviction and sentence other applications and motions which have been filed with respect to this judgment.

a. On or about March 28, 1994, Fiore filed a Motion for Post Conviction Collateral Relief with the Court of Common Pleas of Allegheny County, at Criminal Division: CC NO. 8508740. By Order dated August 18, 1994, the Court of Common

Pleas denied Fiore's post conviction petition.

b. On or about August 29, 1994, Petitioner filed a direct appeal to the Commonwealth Court from the Court's denial of his Petition for Post Conviction Relief by Order dated August 18, 1994 at No. 1892 Pgh 1994. The Commonwealth Court transferred the case to the Superior Court on the Commonwealth's motion. The Superior Court affirmed the conviction.

c. On or about October 18, 1994, petitioner filed yet another "Emergency Application for Extraordinary Relief, or, in the alternative, a Petition for Review" at 107 W.D. Misc. Docket 1994, wherein petitioner again urged the Supreme Court of Pennsylvania to invoke its Kings Bench powers and to set aside Fiore's conviction on the disputed count.

d. Superior Court denied appeal on September 20, 1995, *Commonwealth v. Fiore*, 665 A.2d 1185 (Pa. Super. 1995).

12. Grounds for relief:

Petitioner contends that:

(a) He is being held incarnated [sic] for conduct which the Supreme Curt [sic] of Pennsylvania has determined does not meet the elements of the crime charged; and

(b) He has been denied due process and equal protection by the Courts of Pennsylvania

wherein they have failed to afford him application of the Pennsylvania Supreme Court's decision in *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993).

Petitioner has requested application of the *Scarpone* decision to his case in all levels of the Pennsylvania court system. To the extent he did not specifically raise the denial of his right to due process and equal protection, that issue was not ripe until he has exhausted all avenues of relief, and been denied. It would be futile for him to return to the state court system with this claim in light for the courts' previous decisions.

13. Were you sentenced on more than one count on any indictment, or more than one indictment, in the same court and at the same time.

Yes (X) No ( )

14. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes (X) No ( )

(a) If so, give name and location of court which imposed sentence to be served in the future: Westmoreland County Court of Common Pleas.

(b) And give date and length of sentence to be served in the future: at the expiration of this sentence, 5-10 years.

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes (X) No ( )

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

Executed at _____.
(City, County, State)

I, _____, declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
(Date)

/s/ William Fiore
(Signature of Petitioner)

(Note: No Notary Certification Required)